Supreme Court, U.S.
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No.

In the Supreme Court of the United States

DENARD MORRIS,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether due process requires a new, stricter standard of materiality where the prosecution knowingly utilizes false testimony and disregards a specific request by the defense for exculpatory evidence known to the prosecution.

2. Whether a federal sentence violates the Sixth Amendment right to a trial by jury where the sentence would be unreasonable but for the existence of a judge-found fact for which the jury had previously acquitted the defendant.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Denard Morris ("Morris") hereby petitions this Court to issue a writ of certiorari for review of the ruling of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals affirming the decision of the district court is reported at 498 F.3d 634 (7th Cir. 2007).[1] Pet. App. 1a–20a. The September 25, 2007 Order of the Court of Appeals (Pet. App. 55a–56a) denying Morris's request for rehearing is available at 2007 U.S. App. LEXIS 24040. The district court issued no order after the trial, and the district court's judgment (Pet. App. 21a–35a), dated December 15, 2005, is unpublished. The district court's sentencing memorandum and order (Pet. App. 36a–40a), dated November 19, 2007, and amended judgment (Pet. App. 41a–54a), dated November 19, 2007, and sentencing memorandum and order, are unreported.

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[1] On appeal, the Seventh Circuit affirmed Morris's conviction and sentencing, and remanded in part solely on the issue of resentencing on Count II, as the initial sentence exceeded the statutory maximum for possession of marijuana under 21 U.S.C. § 841(a)(1). Pet. App. 20a. This Petition for Writ of Certioriari is brought in response to the Seventh Circuit's decision affirming the conviction on Counts I and II and the sentencing under Count I.

JURISDICTION

The ruling of the Court of Appeals was entered on August 20, 2007. Pet. App. 1a. On September 25, 2007, the Court of Appeals denied Morris's request for rehearing. Pet. App. at 56a. On January 9, 2008, Justice Stevens granted Morris's application to extend time within which to file a petition for a writ of certiorari until February 22, 2008. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that, "No person shall . . . be deprived of life, liberty, or property, without the due process of law . . . ." U.S. Const. amend. V. The Sixth Amendment to the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend VI. This case also involves Section 5K1.1 of the United States Sentencing Guidelines Manual (2004) (the "Guidelines"), the text of which is reproduced in the Appendix (Pet. App. 57a).

STATEMENT OF THE CASE

Proceedings In The District Court

Denard Morris was charged in the United States District Court for the Northern District of Indiana on three counts: (I) Possession with intent to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. § 841(a)(1); (II) Possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1); and (III) Possession of a firearm in violation of 18 U.S.C. § 924(c). Pet. App. 3a. After a trial by jury, on January 20, 2005 Morris was found guilty on Counts I and II and was acquitted on Count III. *See Id.*

Before trial, Morris brought a motion to compel the government to produce all exculpatory evidence for the defense. Morris included in this motion a request for "[a] full and complete statement of all promises, considerations, rewards, or inducements made by the Government . . . to induce or encourage any individual's testimony." Pet App. 59a. The defense specifically requested evidence of any agreements to recommend leniency in sentencing, agreements to "recommend or not oppose a reduction of the offense level," and agreements to recommend a downward departure for providing substantial assistance to the government. Pet. App. 60a.

At trial, the prosecution disclosed an agreement that its star, and only, eyewitness would receive the statutory minimum, a ten-year sentence, in exchange for testifying against Morris. Pet. App. 5a. The witness, codefendant Tramayne Peterson ("Peterson"), testified that he would receive ten years

in exchange for assisting the prosecution. *Id.* Repeatedly throughout the trial and in its closing argument, the prosecution referred to the agreement with Peterson as being "mandatory" and of a length of ten years. Pet. App. 5a–6a. The prosecution disclosed no information to the defense prior to or during the trial that would indicate a shorter sentence was possible. However, at Peterson's sentencing the government moved for a downward departure, as authorized in U.S.S.G. § 5K1.1, based on Peterson's "substantial" assistance in getting Morris convicted. Pet. App. 6a.

The district court relied on the Guidelines in sentencing Morris. *See* Pet App. 66a. Morris's base sentence range under the Guidelines would have been 210–262 months. *See* U.S.S.G. § 2D1.1(c)(4) (2004); U.S.S.G. ch. 5, pt. A (Sentencing Table). Despite the jury's acquittal on the firearm charge under Count III, the district court found by a preponderance of the evidence that Morris possessed a firearm. Pet. App. 18a–19a. The court applied a two-level enhancement applicable under Section 2D1.1(b)(1) of the Guidelines, which resulted in a new sentencing range of 262–327 months. Pet App. 66a. Considering the enhancement for firearm possession, the district court concluded that the *minimum* Guidelines sentence was sufficient to comply with the factors under Section 3553(a), and imposed a 262-month sentence. Pet. App. 67a–69a.

Proceedings in the Circuit Court

Morris appealed his conviction and sentencing to the United States Court of Appeals for the Seventh Circuit. Oral argument was held on January 12, 2007 and on August 20, 2007 the Seventh Circuit issued its panel opinion. Pet. App. 1a. In its opinion affirming the district court's judgment and sentencing, the Seventh Circuit found prosecutorial misconduct on the part of the government, but failed to find that it deprived Morris of a fair trial.[2] Pet. App. 7a–9a. The Seventh Circuit used the "reasonable likelihood of affecting the jury" standard of materiality in finding that Morris was not deprived of a fair trial. Pet App. 9a. The Seventh Circuit further held that Morris's sentence was reasonable, as the sentence was based on the Guidelines range and thus the presumption of reasonableness applied. Pet. App. 19a.

Morris filed a motion for rehearing, which was denied on September 25, 2007. Pet. App. 55a–56a.

REASONS FOR GRANTING THE WRIT

Morris provides the Court with an opportunity to clarify ambiguities in two areas of the law. First, *Morris* presents a complex instance of prosecutorial misconduct. In previous cases, the Court has

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[2] The Seventh Circuit affirmed all aspects of the lower court's judgment and sentencing, save for the court's sentencing on Count II. The district court sentenced Morris above the statutory maximum on Count II and the Seventh Circuit remanded solely on that Count for resentencing which would not be in violation of the statute. Pet. App. 20a.

addressed the prosecution's knowing use of false testimony, as well as the prosecution's disregard for a specific request for exculpatory evidence, announcing materiality standards in each separate situation. *Morris*, however, involves not one, but both of these types of prosecutorial misconduct. The case represents an unresolved issue that requires the Court to determine the appropriate materiality standard to protect Morris's due process rights, as well as the rights of future defendants. Second, in the wake of *Booker*, the Court has held that sentences within the Guidelines range are presumptively reasonable. This case questions whether such a sentence is constitutional where it would be unreasonable without the existence of judge-found facts—a question of law which has not yet been answered by this Court.

Ambiguity in the law regarding the prosecutorial misconduct found in *Morris* begs a stricter standard of materiality from this Court. The Seventh Circuit erred in holding that blatant prosecutorial misconduct—in the form of sanctioning knowingly false testimony—was not enough to deprive Morris of a fair trial. The prosecution also disregarded a specific *Brady* request for exculpatory material that would have provided Morris with vital impeachment evidence.[3] In finding that the prosecutor's

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[3] In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland, 373 U.S. 83, 87 (1963).* Subsequent decisions have often referred to requests for exculpatory evidence as *Brady* requests or requests for *Brady* material. *See, e.g., United States v. Agurs*, 427 U.S. 97,

misconduct was not material to the outcome of the trial, the Seventh Circuit relied on a materiality standard that did not fully take into account the prejudice and injustice served upon Morris. *See* Pet. App. 9a ("'[T]he conviction [will] be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."'") (quoting *Braun v. Powell*, 227 F.3d 908, 920 (7th Cir. 2000), *cert. denied*, 531 U.S. 1182 (2001) (citation omitted)). Such deliberate intent by the prosecution to mislead the defense and the jury calls for a stronger test of materiality.

Additionally, in *Booker*, this Court held that mandatory sentence enhancements violate the Sixth Amendment where they exceed the statutory maximum authorized by facts found by the jury. *United States v. Booker*, 543 U.S. 220, 244 (2005). As a result, the Court chose to strike down the mandatory Guidelines, replacing them with an advisory Guidelines regime under which sentences must be reasonable. *See id.* at 245. In *Rita*, this Court held that a sentence within the Guidelines range is presumptively reasonable. *Rita v. United States*, 127 S. Ct. 2456, 2459 (2007). However, the Court left open to debate the constitutionality of sentences involving enhancements due to judge-found facts, where that sentence would be unreasonable in the absence of such judge-found facts. *Id.* at 2479–80 (Scalia, J., concurring). The use of judge-found facts violates the Sixth Amendment right to a jury trial where such a sentence would have otherwise been unreasonable,

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106–07 (1976); *United States v. Bagley*, 473 U.S. 667, 680 (1985).

and *Morris* provides a vehicle for the Court to address this issue.

I. AMBIGUITY IN THE LAW RELATING TO DELIBERATE PROSECUTORIAL MISCONDUCT CALLS FOR A STRICTER STANDARD OF MATERIALITY TO PROTECT DUE PROCESS RIGHTS

The Seventh Circuit correctly found that the prosecution committed misconduct during Morris's trial through the prosecution's repeated references to its star witness's plea agreement and his "mandatory minimum" sentence of ten years. Pet. App. 5a–6a. However, in determining whether this misconduct deprived Morris of a fair trial, the Seventh Circuit misapplied the standard for materiality and incorrectly determined Morris was *not* deprived of a fair trial due to the prosecutorial misconduct. Pet. App. 9a.

Where the prosecution disregarded a specific request for exculpatory evidence and then knowingly used and relied upon false testimony at trial, it is incomprehensible that this failure to provide crucial evidence and the corresponding reliance on false evidence did not deprive Morris of a fair trial. Every time the prosecution referred to Peterson's mandatory minimum ten-year sentence, or allowed Peterson to testify to his mandatory ten-year sentence, it violated Morris's right to due process, as guaranteed by the Fifth Amendment of the

Constitution.[4] U.S. Const. amend. V. The Court now has an opportunity to consider whether a stricter standard of materiality should apply in cases that combine the knowing use of false testimony with a disregard for specific evidentiary requests.

A. The Failure to Disclose Specifically Requested Impeachment Evidence and to Knowingly Use False Evidence at Trial is a Denial of Due Process

An ambiguity in the law exists, which the Court can now address through *Morris*. The Court should consider whether cases involving not one, but two forms of prosecutorial misconduct require a stricter standard of materiality in order to protect due process rights.

The prosecution violated Morris's Fifth Amendment due process rights. His trial was plagued by prosecutorial misconduct, which the Seventh Circuit allowed to stand on appeal. In particular, the prosecution knowingly invited false testimony from its sole eyewitness, Peterson, and repeatedly remarked to the jury that Peterson's ten-year sentence was mandatory, while knowing that U.S.S.G. § 5K1.1 was available for a downward

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[4] Morris respectfully requests that this Court reexamine the basis on which the Seventh Circuit determined that Morris was not deprived of a fair trial. "In cases in which there is a claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will reexamine the evidentiary basis on which those conclusions are founded." *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951).

departure for sentencing. Further the prosecution in *Morris* completely disregarded a specific *Brady* request for any downward departures available to the government's sole eyewitness in sentencing. The knowing use of false testimony and related disregard of a specific *Brady* request deprived Morris of due process.

Prior to his trial, Morris specifically requested *Brady* materials concerning any inducements or downward departures. *See* Pet App. 59a–60a. Other than the minimum ten-year sentence to which Peterson testified, the prosecution never disclosed anything relating to downward departures or inducements to the defense. Subsequently, at trial, false testimony relating to the witness's sentence was repeatedly presented, and after Morris's conviction the government moved for a downward departure. *See* Pet. App. 5a–6a. This use of known false evidence by the prosecution during Morris's trial denied him due process. The prosecution's "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam)); *Napue v. Illinois*, 360 U.S. 264, 270 (1959) (finding that the fact that other evidence was presented regarding the witness's credibility does not remove the taint of false testimony). In *Mooney* the Court stated:

> It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a

> means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Mooney, 294 U.S. at 112. In *Morris*, the prosecution was clearly aware that Peterson's testimony was false, but the prosecution willingly allowed such testimony and repeatedly referred to the tainted evidence during its closing remarks. This deprived Morris of due process by preventing him from fairly presenting the bias of the government's *crucial* witness to the jury. *See* Pet. App. 7a–8a.

This Court has held in a long line of cases that a conviction obtained by the knowing use of false or perjured testimony is fundamentally unfair and has applied a strict standard of materiality as these cases involved prosecutorial misconduct and the corruption of a trial's truth-seeking function. *United States v. Agurs*, 427 U.S. 97, 103 & n.8 (1976) (citing *Pyle v. Kansas*, 317 U.S. 213 (1942); *Alcorta v. Texas*, 355 U.S. 28 (1957); *Napue*, 360 U.S. 264; *Miller v. Pate*, 386 U.S. 1 (1967); *Giglio*, 405 U.S. 150; *Donnelly v. DeChristoforo*, 416 U.S. 637(1974)).

The ultimate question in examining prosecutorial misconduct is whether the prosecutor's comments "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). Here, the prosecution's failure to

disclose specifically requested *Brady* material combined with its promotion of and repeated reliance on false testimony during Morris's trial, deprived Morris of due process. First, the prosecution failed to disclose the potential downward departure for Peterson, which was specifically requested by the defense. *See* Pet. App. 7a, 59a–60a. As the Seventh Circuit stated in its opinion, "[n]o competent Assistant U.S. Attorney is unaware of the existence of U.S.S.G. § 5K1.1." Pet. App. 7a. Thus, the prosecution was plainly aware of the possibility of a downward departure for Peterson from the "mandatory minimum" repeatedly touted by it at trial. In fact, the prosecutor even joined in the motion at Peterson's sentencing hearing requesting the court grant Peterson a sentence below the mandatory minimum based on the substantial assistance that Peterson had rendered to the government. Pet. App. 6a. By failing to disclose the availability and possibility of this downward departure, the prosecution ignored a specific defense request for information directly related to its sole eyewitness's credibility. *See* Pet. App. 7a–8a, 59a–60a.

Second, the prosecution knowingly sanctioned the use of false testimony both by allowing Peterson to testify to his mandatory minimum ten-year sentence and in the prosecution's repeated references to the fact that the ten-year sentence was indeed "mandatory." Pet. App. 5a–6a. As the Seventh Circuit properly held, "[i]t was therefore improper both to give the jury the impression that Peterson's sentence could not go below 10 years during his examination of Peterson, and then later to argue the same thing to the jury." Pet. App. 8a. In fact, it is

precisely this kind of conduct that strikes at the heart of the integrity of the trial. *Id.* (citing *Giglio*, 405 U.S. at 153 (holding that rudimentary demands of justice are violated when the State allows false evidence to go uncorrected when it appears)). "[T]he prosecutor's misleading statement . . . deprived Morris of potential impeachment evidence in violation of *Giglio*." Pet. App. 8a. It was "[t]he possibility of a lower sentence, awarded . . . because of the assistance he was providing at Morris's trial, [which] provided an incentive for Peterson to say whatever the prosecutor wanted to hear." *Id.* However, the Seventh Circuit did not go far enough in its opinion. The prosecution's misleading statements didn't just deprive Morris of "potential impeachment evidence"—it deprived Morris of *essential* impeachment evidence and deprived him of his right to due process. The Seventh Circuit stopped far short of what justice and fairness demanded in this case. The fact remains that Peterson was the *only* witness to place the drugs in Morris's possession and without his testimony there is no conviction.

The complex set of facts in *Morris*, involving multiple instances of misconduct, does not fit squarely into the Court's prior holdings. Instead, this case reveals an ambiguity with regard to the standards of due process, which the Court now has an opportunity to answer by granting this writ of certiorari.

B. The Cumulative Effect of the Prosecutorial Misconduct in *Morris* Begs This Court to Announce a More Appropriate Standard of Materiality to Protect Due Process Rights

The present case represents a situation in which deliberate prosecutorial misconduct runs afoul of this Court's precedents in two different areas. The prosecution in *Morris* violated both *Mooney*, by sanctioning and eliciting knowing false testimony, and *Brady*, by failing to disclose specifically requested impeachment material which was known to the defense. However, *Morris* does not fit neatly into either category of misconduct cases. Instead, *Morris* represents a distinctive situation, which combines the knowing use of false testimony and the disregard of a specific request for exculpatory evidence in the same case. *Morris* effectively bridges the gap between the *Mooney* and *Brady* lines of cases, and as such, the misconduct suffered by Morris can be corrected by this Court through the establishment of a stricter materiality standard, more deferential to defendants' due process rights.

In allowing deliberate prosecutorial misconduct to go unchecked in this case the Seventh Circuit has not only downplayed the violation of Morris's due process rights, it has in truth opened the door for similar misconduct to be repeated in future cases. The presence of deliberate prosecutorial misconduct in *Morris*—the prosecution's knowing use of false testimony and disregard for a specific *Brady* request—should lead the Court to recognize a stricter standard of materiality that will protect

criminal defendants' rights while at the same time deterring such future conduct by the government.

Kyles v. Whitley, 514 U.S. 419 (1995), is the current "touchstone on materiality" for cases involving the prosecution's failure to disclose evidence. *Banks v. Dretke*, 540 U.S. 668, 698 (2004) (stating that the *Brady* standard of materiality is "met when 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict'") (quoting *Kyles*, 514 U.S. at 435). What the defendant must show is a "'reasonable probability' of a different result." *Kyles*, 514 U.S. at 434. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* "A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.' *Id.* (citations omitted). This standard does not go far enough.

In *Morris*, Peterson's testimony was vital to the government's case and the eventual conviction; he was the sole eyewitness to put Morris in possession of the drugs. *See* Pet. App. 2a–3a. The jury members were deprived of the ability to fairly assess his credibility, as they were under the impression that he would receive a "mandatory minimum" sentence of ten years when in fact he received almost half that—a little over five years. Pet. App. 6a. Based on the record, it cannot be denied that there is a "reasonable probability of a different result" had

the prosecution not knowingly suppressed evidence and relied on false testimony. *See* Pet. App. 5a–6a.

This unsettled area of the law requires a firm decision by this Court. As Justice Marshall stated in his dissent in *Bagley*, "[w]hen the Government withholds from a defendant evidence that might impeach the prosecution's *only witnesses*, that failure to disclose cannot be deemed harmless error." *United States v. Bagley*, 473 U.S. 667, 685 (1985) (Marshall, J., dissenting). Moreover, when the prosecution fails to disclose impeachment evidence relating to the credibility of key witnesses, in response to a specific request, the "truth-finding process of trial is necessarily thrown askew." *Id.* at 690 (Marshall, J., dissenting).[5]

It defies logic that a prosecutor who blatantly ignored a specific *Brady* request and then proceeded to actively suppress this material impeachment evidence does not deprive a defendant of due process. Here, the prosecution's use of false testimony, combined with its failure to disclose specifically requested *Brady* materials, deprived Morris of due process, as guaranteed by the Fifth Amendment. U.S. Const. amend. V. Consequently, this conduct was clearly material to the trial and deprived Morris of a fair trial. Thus, the Seventh Circuit's finding that this conduct was not material is in error.

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[5] In *Bagley*, the Government itself suggested that a materiality standard more favorable to the defendant be adopted in specific request cases. *Bagley*, 473 U.S. at 682 (stating the Government noted "that an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist").

In sanctioning this deliberate prosecutorial misconduct, the Seventh Circuit has left the door open for prosecutors throughout the country to duplicate the very same misconduct that occurred in this case.[6] And as the Seventh Circuit found, it was clear prosecutorial misconduct to repeatedly refer to a "mandatory minimum" sentence when the prosecution plainly knew there was no such thing. Pet. App. 6a–7a. However, in finding Morris was not deprived of a fair trial, the Seventh Circuit was effectively sanctioning this type of deliberate prosecutorial misconduct. This cannot be allowed.

The prosecution's failure to satisfy Morris's specific *Brady* request and its knowing use of false testimony must not be condoned. The Seventh Circuit's refusal to undo this acknowledged misconduct amounts to a tacit acceptance of such behavior. If allowed to stand, the Seventh Circuit's application of materiality would enable future prosecutors to ride roughshod over the due process rights of criminal defendants. On a whim, prosecutors could neglect to inform defendants of U.S.S.G. § 5K1.1, while espousing the "mandatory

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[6] In fact, in a recent Sixth Circuit opinion, conduct similar to that of the prosecution in *Morris* was condoned in a rehearing *en banc* after such conduct was stricken down by the original panel. *Bell v. Bell*, 512 F.3d 223, 229–30 (6th Cir. 2008) (finding no evidence of a tacit agreement between the prosecutor and its witness despite the fact the prosecutor sent a letter to the parole board requesting parole at the earliest possible date based on the witness's testimony at trial). Also, the prosecutor in *Bell* stated in no uncertain terms to the jury that he did not have "any say-so with the Parole Board" and he had "nothing to do with that they do in their own respective realms." *Id.* at 229.

minimum" sentence to the trier of fact, causing countless defendants to lose essential evidence. Thus, it is vital that the Court address this issue and clarify a materiality standard more deferential to the defense in criminal trials to prevent such deliberate misconduct from occurring and to protect the due process rights of defendants.

II. WHERE A SENTENCE WOULD OTHERWISE BE UNREASONABLE, THE USE OF ACQUITTED CONDUCT TO ENHANCE A DEFENDANT'S SENTENCE VIOLATES THE SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY

In a recent concurrence, Justice Scalia exposed a blind spot in this Court's jurisprudence regarding post-*Booker* federal sentencing. *See Rita*, 127 S. Ct. at 2479–80 (Scalia, J., concurring); *see also Gall v. United States*, 128 S. Ct. 586, 602–03 (2007) (Scalia, J., concurring). It is towards this blind spot that Morris directs the Court's vision.

In *Booker*, this Court held that "[a]ny fact . . . necessary to support a sentence exceeding the maximum authorized by the facts established by a . . . verdict must be admitted by a defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. The Court then struck down the mandatory nature of the Guidelines, replacing it with an advisory Guidelines regime that required a reasonableness test for review of all sentences. *Id.* at 245–46. In *Rita*, this Court then held that a presumption of reasonableness applies to the appellate review of sentences that are based on a

Guidelines range. *Rita*, 127 S. Ct. at 2462. Although these decisions have helped establish a foundation for a new approach to federal sentencing, they have nonetheless unveiled cracks in that foundation, which must be repaired in order to strengthen this Court's jurisprudence.

In *Rita*, Justice Scalia argued that the Court failed to explain why the pre-*Booker* mandatory Guidelines were unconstitutional, while the post-*Booker* reasonableness and substantive review regime, which has the same potential for a Sixth Amendment violation, is not unconstitutional. *Rita*, 127 S. Ct. at 2484 (Scalia, J., concurring). Further, it has repeatedly been suggested that "[t]he door . . . remains open for a defendant to demonstrate that his sentence . . . would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury." *Gall*, 128 S. Ct. at 602–03 (Scalia, J., concurring); *see also Rita*, 127 S. Ct. at 2479 (Scalia, J., concurring) (noting that a Sixth Amendment challenge is available against a sentence that would not have been upheld as reasonable without the existence of judge-found facts).

Despite repeated attempts by this Court to avoid Sixth Amendment violations and to determine the proper scope of discretion in sentencing, "there will inevitably be some constitutional violations under a system of substantive reasonableness review, because there will be *some* sentences that will be upheld as reasonable only because of the existence of judge-found facts." *Rita*, 127 S. Ct. at 2478 (Scalia, J., concurring). As such, it is vital that this Court shed light on this blind spot by granting a writ of

certiorari to address the question presented in this case.

Morris's sentence under Count I violates the Sixth Amendment right to a trial by jury. The sentence would not have been reasonable without the district court finding by a preponderance of the evidence that Morris possessed a firearm while trafficking drugs, a purely judge-found fact in opposition to his acquittal under Count III.

The district court enhanced Morris's sentence, as indicated in the Guidelines, after concluding that under the preponderance of the evidence he possessed a firearm in connection with drug trafficking. Pet. App. 64a. However, the district court's conclusion was in opposition to the jury's acquittal of Morris for possession of a firearm under 18 U.S.C. § 924(c). *See* Pet. App. 63a–64a, As such, the sentence enhancement was calculated solely on the basis of a judge-found fact, rather than a fact proven to a jury beyond a reasonable doubt. The district court applied the enhanced sentence range and sentenced Morris to 262 months. Pet. App. 3a, 66a.

On appeal, the Seventh Circuit affirmed Morris's sentence under Count I, holding that the sentence was reasonable. Pet. App. 19a. The Seventh Circuit, however, failed to consider that Morris's sentence would have been unreasonable but for the existence of the district court's finding that Morris possessed a firearm.

The district court applied the firearm enhancement and held that the minimum Guidelines sentence of 262 months was sufficient for Morris. Pet. App. 67a–69a. As such, it would have been

unreasonable to apply the exact same sentence without the firearm possession.

This Court has previously noted that in considering Section 3553(a) factors in sentencing, a district court's particular insights in a given case are invaluable. *See Koon v. United States*, 518 U.S. 81, 98–99 (1996). As was argued in *Rita*, in determining the reasonableness of a sentence, an appellate court must evaluate "what motivated the [district court's] individualized sentencing decision." *Rita*, 127 S. Ct. at 2472 (Stevens, J., concurring). In this case, Morris's sentence was established and motivated in part based on the district court's finding of firearm possession. Pet. App. 64a–66a. The district court could not have intended an identical 262 month sentence to apply both with and without the firearm enhancement—otherwise the firearm enhancement would have had no purpose. The district court would not have applied the maximum baseline sentence in the absence of the firearm enhancement. Much to the opposite, even with the firearm enhancement, the district court found that the *minimum* sentence under the Guidelines was appropriate. Pet. App. 68a–69a. Given that the firearm enhancement must have affected the sentence, only a shorter sentence could possibly be reasonable this case.

Without the enhancement, Morris's sentence could have been as low as 210 months, almost five (5) years less than his current sentence. *See* U.S.S.G. § 2D1.1(c)(4); U.S.S.G. ch. 5, pt. A (Sentencing Table). Had the district court not considered judge-found facts, Morris's sentence undoubtedly would have been lower. Thus, although the 262 month sentence represented the high end of Morris's base sentence level, given the district

court's basis for its individualized decision in this case, in the absence of judge-found facts that sentence would have been unreasonable and in violation of the Sixth Amendment as applied to Morris.

The circumstances of this case indicate that without the sentence enhancement Morris's sentence would be unreasonable. Morris thus presents this Court with an opportunity to clarify the scope of reasonableness and the bounds of the Sixth Amendment in relation to post-*Booker* sentencing decisions by answering the question of whether a federal sentence violates the Sixth Amendment right to a trial by jury where the sentence would be unreasonable but for the existence of a judge-found fact for which the jury had previously acquitted the defendant.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES of America, Plaintiff-Appellee,

v.

Denard MORRIS, Defendant-Appellant.

No. 05–4679

Argued: January 12, 2007.
Decided: August 20, 2007.
Rehearing Denied Sept. 25, 2007

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498 F.3d 634

Before POSNER, WOOD, and SYKES, Circuit Judges.

WOOD, Circuit Judge.

Denard Morris was convicted on various drug charges, for which he received a typically severe sentence of 262 months' incarceration. His appeal centers on alleged governmental misconduct at the trial. Morris's cousin, Tramayne Peterson, pleaded guilty to Count I of the indictment and testified against Morris as part of a plea bargain with the government. When questioned about his plea deal at trial, Peterson asserted that the mandatory minimum sentence for his plea was 10 years; the prosecutor reinforced this by arguing to the jury on multiple occasions that Peterson could not get less than 10 years. Following Morris's conviction, the

government moved under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 for Peterson to be sentenced below the mandatory minimum to a 70–month term; the court granted that motion. While we conclude that the prosecutor did commit misconduct by misleading the jury about the plea deal that the government reached with Peterson, this act was not enough to infect the fundamental fairness of the entire proceeding. With the exception of Morris's challenge to the concurrent sentence he received on Count II, which the prosecution agrees is beyond the statutory maximum and must be fixed on remand, all of his other arguments lack merit. Thus, with that minor qualification, we affirm.

I.

On August 15, 2003, Tramayne Peterson was looking for a ride to the mall, when Morris, his cousin, pulled up in a white van. Peterson hopped in. A few blocks later, the men drove past Officer George Valdez, Jr., of the East Chicago police force. Officer Valdez recognized Morris, having seen his picture during that day's squad briefing. Knowing there was an active bench warrant for Morris's arrest, Valdez pulled the van over.

According to Peterson's testimony, he had just finished "rolling marijuana" when Officer Valdez pulled behind the van. As Morris stopped the van, he handed Peterson a grey plastic bag and said, "Take this and run." Peterson did and Officer Cima DeVilla gave chase. Although Peterson claimed not to know what was in the bag when his cousin handed it to him, as Peterson ran and jumped a fence, "stuff"—beginning with "a white substance" that he "figured ... to be cocaine"—began to fall out of the bag. Peterson continued to run as a .45 caliber pistol, baggies of marijuana and cocaine, and an

electronic scale all tumbled out behind him. Eventually Peterson dropped the bag. After vaulting over a few more fences, he was apprehended by a third officer, Anton West. Meanwhile, Officer Valdez arrested Morris without incident. No additional drugs, firearms, or other contraband was found on Morris's person or in the van.

Following his arrest, Morris was indicted on one count of possession of cocaine base in the form of crack with intent to distribute, one count of possession of marijuana with intent to distribute, both in violation of 21 U.S.C. § 841(a)(1), and one count of carrying a firearm during and in relation to a drug crime, in violation of 18 U.S.C. § 924(c). He was convicted of the first two counts after a jury trial and sentenced to 262 months on each count.

II.

Morris has taken a kitchen-sink approach to his appeal, raising multiple legal challenges out of a few discrete factual constellations. Two basic claims, however, predominate: insufficiency of the evidence and prosecutorial misconduct. We briefly explain the legal standards that apply before turning to the specifics of his arguments.

Defendants challenging the sufficiency of the evidence supporting their conviction face an extremely high burden. We will reverse "'only if, after viewing all of the evidence in a light most favorable to the government, and drawing all reasonable inferences therefrom, ...a rational trier of fact could not have found the essential elements of the crime, beyond a reasonable doubt.'" *United States v. Moore*, 446 F.3d 671, 677 (7th Cir.2006) (quoting *United States v. Rivera*, 825 F.2d 152, 158–59 (7th Cir.1987)).

Claims of prosecutorial misconduct are also difficult to sustain. When evaluating a claim of prosecutorial misconduct, "the ultimate question [is] 'whether the prosecutor['s] comments so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Swofford v. Dobucki*, 137 F.3d 442, 445 (7th Cir. 1998) (quoting *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (internal quotation omitted)). In reviewing allegations of improper comments by a prosecutor, this court employs a two-step process. "We first look at the comments in isolation to determine if they were improper." *United States v. Castillo*, 148 F.3d 770, 775 (7th Cir.1998). Factors the Supreme Court has found helpful in evaluating whether comments were improper include the following:

> (1) whether the prosecutor manipulated or misstated the evidence, (2) whether the comments implicated other specific rights of the accused (such as the right to remain silent), (3) whether the comments were invited by or responsive to defense counsel's summation, (4) whether the trial court's instructions ameliorated the harm, (5) whether the evidence weighed heavily against the defendant, and (6) whether the defendant had an opportunity to rebut the prosecutor's comments.

Swofford, 137 F.3d at 444–45 (citing *Darden*, 477 U.S. at 181–82, 106 S.Ct. 2464). "If we find the comments are proper, the analysis ends. If we find they are improper, we must then examine the comments in light of the record as a whole to determine whether the comments deprived the defendant of a fair trial." *Castillo*, 148 F.3d at 775.

1. Misleading the jury as to Peterson's sentence

Morris's most substantial allegations center on Peterson's testimony and the government's use of it in its arguments to the jury. He argues that Peterson's testimony was false and misleading based on the following exchange with Assistant U.S. Attorney Robert N. Trgovich, the prosecutor, during direct examination:

> Q: What's the government going to do for you under that plea agreement?
>
> A: Just sentence me; they said they was going to make a recommendation to sentence me at the low end of the guidelines.
>
> Q: And what about with respect to Counts Two and Three?
>
> A: They was going to dismiss them.
>
> Q: Do you understand what type of sentence you're looking at under Count One?
>
> A: Yes, sir, I do.
>
> Q: *And what is that sentence?*
>
> A: *Ten years.*
>
> Q: *And is that a mandatory sentence?*
>
> A: *Yes, sir.*

(Emphasis added.) Peterson reiterated these assertions during cross-examination.

Building on Peterson's statements, AUSA Trgovich affirmatively represented to the jury several times that Peterson would be subject to a mandatory minimum sentence of 10 years. At the beginning of the government's closing statement, he noted that Peterson had signed a plea agreement. He continued,

> But what is Tramayne Peterson looking at? And he told you. He's looking at a mandatory minimum sentence, mandatory means common meaning has to be imposed, and minimum means this is the lowest he can get, ten years. So Tramayne Peterson was not given a pass for his testimony. He's not walking away at the end of the day free. He's gotten years.

Trgovich reinforced the notion that the sentence could not be less than 10 years by noting in his closing that "It would be agreed that a ten-year sentence is something. It's not—not facing anything," and in his rebuttal by remarking, "a mandatory sentence of ten years is not a great deal."

In fact, contrary to AUSA Trgovich's statements, there was nothing immutable about the 10–year term reflected in Peterson's plea agreement. As any prosecutor well knows, the government has the power to move for a reduction below the statutory minimum. And that is what it did. At Peterson's sentencing hearing, AUSA Trgovich himself joined in a motion requesting the court to give a sentence below the mandatory minimum based on the substantial assistance that Peterson had rendered to the government. See U.S.S.G. § 5K1.1 ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). The court accepted the government's motion and calculated a new guideline range of 70 to 87 months. The court then sentenced Peterson to 70 months in prison, four years and two months shorter than the "mandatory" length the prosecutor had stressed at Morris's trial.

Morris finds three separate reasons why this course of events entitles him to a reversal of his conviction. First, he claims that the AUSA improperly bolstered Peterson's testimony, by giving the jury the erroneous impression that Peterson no longer had a motive to lie. Second, Morris argues that the prosecutor's failure to disclose the government's intention to request a sentence below 10 years violated his Sixth Amendment rights by depriving him of the opportunity to impeach Peterson's testimony fully. Finally, he argues that if Peterson's testimony had been presented in the proper light, the jury would have discounted it so thoroughly that the remaining evidence would have been insufficient to convict.

We agree with Morris that AUSA Trgovich's comments amounted to prosecutorial misconduct. Although the government argues to this court that its comments at trial were meant only to suggest that Peterson *thought* that he was facing an irreducible ten-year sentence, and maybe that is what the prosecutor intended to say, in fact he said much more. He told the jury flatly that there was no way that Peterson could get less than 10 years in prison, emphasizing that "mandatory means ... has to be imposed, and minimum means this is the lowest he can get, ten years." This goes beyond any comment about what Peterson's understanding of his plea agreement was, and we make no comment on how we would regard a statement limited to something like "Mr. Peterson told you that he understands he will spend at least ten years in prison."

No competent Assistant U.S. Attorney is unaware of the existence of U.S.S.G. § 5K1.1. Trgovich plainly knew that it was within the government's

discretion to ask the judge to impose a sentence below the normal statutory minimum, if Peterson lived up to his end of the plea agreement—that is exactly what wound up happening. It was therefore improper both to give the jury the impression that Peterson's sentence could not go below 10 years during his examination of Peterson, and then later to argue the same thing to the jury, at least when it is obvious that the United States had not firmly rejected the possibility of the § 5K1.1 motion.

As the Supreme Court's decision in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), makes clear, this kind of conduct strikes at the heart of the integrity of the trial. There, the Court faced a case where the government had failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the government. The Supreme Court reiterated that "rudimentary demands of justice" are violated when "'the State, although not soliciting false evidence, allows it to go uncorrected when it appears.'" *Id.* at 153, 92 S.Ct. 763, citing *Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959). Here, the prosecutor's misleading statement ran the risk of facilitating untruthful testimony from Peterson, and it deprived Morris of potential impeachment evidence in violation of *Giglio*. See also *Braun v. Powell*, 227 F.3d 908, 920 (7th Cir.2000). The possibility of a lower sentence, awarded in part precisely because of the assistance he was providing at Morris's trial, provided an incentive for Peterson to say whatever the prosecutor wanted to hear.

Because we have concluded that prosecutorial misconduct occurred here, we must go on to consider whether "in light of the record as a whole ... the

comments deprived the defendant of a fair trial." *Castillo*, 148 F.3d at 775. The Supreme Court has announced two different standards to employ in deciding whether improper comments were material. The easier standard for the defendant to meet, which is used where the prosecutor knowingly relies on false testimony, requires "the conviction [to] be set aside 'if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *Braun*, 227 F.3d at 920 (quoting *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976)).

Even under this favorable standard (which, we add, is not necessarily the best fit here), we cannot conclude on this record that AUSA Trgovich's improper comments were material and therefore deprived Morris of a fair trial. The picture the jury had before it of Peterson's plea agreement made it aware that he was receiving a substantial benefit for his testimony and, more importantly, that he had strong incentives to please the government. Peterson revealed to the jury that in exchange for his testimony, the government would drop two of the charges (Counts II and III) and would ask the court to give him a sentence at the bottom end of the guideline range. In addition, the court stressed that the jury would have to evaluate Peterson's credibility carefully. Although the jury might have recognized the potential for an additional reduction in Peterson's sentence as a marginally greater incentive for Peterson to tailor his testimony in favor of the government, the information that the jury had before it was not different enough to lead us to believe that there was a "reasonable likelihood" that the result would have changed. See *Giglio*, 405 U.S. at 154, 92 S.Ct. 763.

Morris's final argument about the prosecutor's emphasis on the statutory mandatory minimum focuses on the sufficiency of the evidence. Morris argues that had Peterson's bias been correctly stated the jury would have found his testimony otherwise so internally contradictory as to be unbelievable. Finding Peterson's testimony unbelievable, Morris continues, the jury would not have had sufficient evidence to link Morris to the drugs.

We need not belabor this point. It is enough to point out that the jury was entitled to disbelieve Peterson when he said that he did not know what was in the bag that Morris thrust on him at the moment of the encounter with the police. Juries pick and choose what to believe, not only from witness to witness, but also from statement to statement by one witness. This jury was entitled to conclude that Peterson was lying about that detail, but that the general picture he portrayed was true. The government's theory was that once Peterson discovered the drugs, he intended to return them to Morris when that became feasible, which is why he initially kept carrying them as he ran. There is nothing in Peterson's testimony so internally inconsistent that the jury was compelled to disregard it. Looked at as a whole, the evidence was easily sufficient to support Morris's conviction.

A great deal of additional evidence linked Morris to the contents of the bag and to the crime. First, Drug Enforcement Agency (DEA) fingerprint specialist Joseph V. Ambrozich testified that he matched Morris's fingerprint, but not Peterson's, to one of the two fingerprints found on the drug scale that fell out of the grey bag while Peterson was running. Second, James Cronin, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and

Explosives, testified that the firearm that fell out of the grey plastic bag was purchased by LaToya Brown. Peterson testified that Morris had said that "LaToya [Brown] had left it in the van that day, earlier that day at a friend's." In addition to Peterson's testimony linking Brown to Morris, East Chicago Police Officer Robert Aponte also testified that Brown had come into the police station to retrieve her cell phone, which had been left in Morris's van. Finally, as Officer Aponte testified, during the execution of a search warrant unrelated to Morris's case, the East Chicago police discovered a letter from Morris to one Biffy Mack, in which Morris referred to the crime. He puffed,

> I got this shit beat my cousin got caught with the shit I'm going to trial I've been taking care of him and gave him the Delta so he won't flip flop on me. But he cool now since they indicted us with a simple possession and firearms charge and he any facing shit if he cop out to count 1 possession and they drop his other firearms charge.

Given this additional evidence against Morris, we are confident that nothing in the treatment of Peterson as a witness undermined the sufficiency of the evidence supporting the verdict.

2. Admission of the bench warrant for Morris's arrest

Morris's second set of arguments stems from the district court's decision to allow the introduction of testimony about the existence of a bench warrant for his arrest. Officer Valdez testified briefly about the bench warrant. He described noticing "the defendant in a white van coming towards me. We passed each other up. I remember seeing the defendant's picture in the squad room during a

briefing that day, and I noticed he was wanted for an active bench warrant." The officer also mentioned that he "contacted dispatch to make sure the warrant was still active and to confirm the warrant." In closing argument, the prosecutor referred to the warrant to explain why Morris wanted the bag with the drugs and gun out of the van:

> [H]e further had to know that he was in all likelihood that he was stopped because of the warrant that was outstanding for him. And when you're stopped for a warrant, you're going to be arrested, which means the van is going to be towed, and searched. And what was in the van would have been discovered.

Morris argues that the admission of this evidence led to two errors. First, he claims that the testimony about the bench warrant exacerbated the alleged lack of evidence tying him to the drugs and allowed the jury to convict him based only on the assumption that he was a habitual offender and a fugitive from the law. Morris also submits that the prosecutor's references to the bench warrant in his closing argument were unfairly prejudicial.

The court's decision to admit references to the bench warrant is reviewed for abuse of discretion. See *United States v. Hale*, 448 F.3d 971, 985 (7th Cir. 2006). The government is barred by FED. R. EVID. 404(b) from introducing evidence of a defendant's bad acts in order to show that he acted on the occasion in question in conformity with his bad character. Evidence of a prior bad act may be admitted, however, when that act is "so 'inextricably intertwined' with, or 'intricately related' to, charged conduct that it helps the fact finder form a more complete picture of the criminal activity." *Hale*, 448 F.3d at 985. Like all evidence, the bench warrant

cannot be admitted into evidence if it is substantially more prejudicial than probative. FED. R. EVID. 403; see also *Old Chief v. United States*, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

The district court did not abuse its discretion in admitting the officer's testimony about the bench warrant. The testimony about the warrant was not introduced to "prove that [Morris] is a person of bad character and likely therefore to have committed the crime of which he is accused in the present case." *United States v. Paladino*, 401 F.3d 471, 474–75 (7th Cir.2005). The district court reasonably concluded that this testimony supplied a necessary part of the government's case. Without it, the prosecution could not have explained why Officer Valdez stopped Morris's van. Later, the prosecutor suggested to the jury that this testimony helped to explain Morris's motivation for telling Peterson to flee from the van. The district court was well within its discretion to strike the balance for purposes of Rule 404 where it did.

3. Additional claims of prosecutorial misconduct

Morris also alleges that the prosecutor committed misconduct by "vouching" for Peterson's truthfulness. Morris did not object to this argument at trial, and so we review only for plain error under FED. R. CRIM. P. 52(b). See *United States v. Clarke*, 227 F.3d 874, 884 (7th Cir.2000). For reversal, there first must be "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson v. United States*, 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). Moreover, reversal is not automatic if those three elements are established. In addition, before

overturning a conviction we must find that "the error seriously affect[s] the fairness, integrity, or public reputation of the judicial proceedings." *Johnson*, 520 U.S. at 467, 117 S.Ct. 1544 (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)) (internal quotation marks omitted).

The rule against a prosecutor's vouching for a witness actually encompasses two different kinds of comments: first, "a prosecutor may not express her personal belief in the truthfulness of a witness," and second, "a prosecutor may not imply that facts not before the jury lend a witness credibility." *United States v. Thornton*, 197 F.3d 241, 252 (7th Cir.1999). Morris claims only that an error of the first type occurred here.

He focuses on two of the AUSA's comments, both made in closing argument. In the first one, the prosecutor said that "[t]here was some reference as to what the government wants to hear. The government always, and only wants to hear the truth from cooperators. That's why in their plea agreement, as defendant Peterson told you, if he does not tell the truth, he loses his plea agreement." We have held on many occasions that the prosecutor "is entitled to get into evidence the fact that the [plea] deals are conditioned upon truthful testimony." *Thornton*, 197 F.3d at 255. The comments made here, focusing on the incentives provided by defendant's plea agreement for him to tell the truth, resemble a similar argument about a plea agreement that we accepted in *United States v. Renteria*, 106 F.3d 765, 766–67 (7th Cir.1997). There, we concluded that "the prosecutor was free to invite the jury to draw a particular inference from [the plea agreement]. Defense counsel was free to urge a competing inference, as he did on numerous

occasions. By arguing as they did, both sides respected the jury's ability to evaluate credibility based on the facts in evidence." *Id.* at 767 (internal citations omitted). That is all the prosecutor did here, and thus he did not in this respect cross any forbidden line.

Later, the prosecutor addressed Peterson's testimony that he just had "rolled marijuana" when Officer Valdez pulled the van over:

> Certainly at his plea hearing and here, he said he was rolling—he didn't say he was smoking, he testified he was rolling, okay? If [Peterson] was not telling the truth, and he was sworn here, that doesn't help his case, doesn't help you believe that—believe him, because it's something that he didn't say before. But he's sworn to tell the truth after his plea, and he's took an oath here to tell the truth. If he's making this all up, why would he add that fact? How does it help him? It doesn't. It's his effort to be totally candid and truthful about what happened on August 15th in the van.

This longer comment is a somewhat closer call, but in context we find no impermissible vouching. In addition to reiterating the incentives Peterson had for telling the truth, the prosecutor's statement addresses Peterson's inclusion in his testimony of the fact that he had been rolling marijuana. Marijuana, of course, is a controlled substance, and Peterson admitted to possessing some for personal use in his testimony. It was fair, we think, for the AUSA to suggest that Peterson had no reason to include that detail if he was not being truthful. In making this comment, the prosecutor's characterization was "based on what was in the record, not upon the prosecutor's own personal

belief." *Clarke*, 227 F.3d at 884. There was no prosecutorial misconduct based on vouching.

Morris's final argument for prosecutorial misconduct is that the prosecutor commented on the defendant's failure to take the stand by saying in his opening statement that "at the end of the day, there is probably not going to be too much contested about this." This statement addressed the facts established by the testimony of the three officers who stopped and arrested Peterson and Morris. The prosecutor was not commenting on the defendant's testimony or lack thereof. (In fact, there was not much contested about the traffic stop, as Morris's defense did not contest the events testified to by the officers. Instead, Morris's defense was that the drugs and firearm belonged to Peterson.) We find no error here, much less plain error.

4. Evidence that the drugs were crack

Morris's fourth set of arguments center on the government's supposed failure to prove that the drugs in question consisted of "50 grams or more of a mixture or substance ... which contains cocaine base." 21 U.S.C. § 841(b)(iii). He submits that the government never sufficiently proved that the drugs in question were crack cocaine, rather than some other form of cocaine. Because he failed to object at trial, once again the standard of review is plain error.

Morris's first argument is that there was insufficient evidence to find that the drugs in question were crack. This is ground that we have often covered in other opinions. In *United States v. Edwards*, 397 F.3d 570, 573–76 (7th Cir.2005), we held that the term "cocaine base" for purposes of § 841(b) borrows the definition contained in U.S.S.G. § 2D1.1. Under § 2D1.1, "'Cocaine base' ... means

'crack.' 'Crack' is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form." U.S.S.G. § 2D1.1(c), Note D. This definition distinguishes between both powder cocaine (cocaine hydrochloride) and cocaine bases and also between crack cocaine and other forms of cocaine base. As we noted in *Edwards*, "All crack is cocaine base but not all cocaine base is crack." 397 F.3d at 571.

Obliquely relying on our decision in *Edwards*, Morris argues that the government's expert relied on the definition of crack contained in the sentencing guidelines rather than on a scientific definition differentiating various forms of cocaine base. See 397 F.3d at 572–73. In *Edwards*, however, the defense produced expert testimony indicating that the samples tested "revealed none of the telltale signs of crack; among other things, the substances did not exhibit the color or form that results from the process of mixing cocaine hydrochloride (powder cocaine) with sodium bicarbonate to produce crack." *Id.* at 573. As a result, the district court concluded that while the substance at issue was cocaine base it was not crack, and the mandatory minimum did not apply.

This case is unlike *Edwards*, because the government produced substantial evidence that the drugs in question were crack and the defendant produced no evidence to the contrary. *Cf. Booker*, 260 F.3d at 823–24; *United States v. Abdul*, 122 F.3d 477, 478–80 (7th Cir.1997). Morris focuses on the fact that the prosecution's expert, DEA Agent Fuelster, described one of the three different drug exhibits as "cocaine hydrochloride," which is the scientific name for the acid form of cocaine (usually

found in powder form). The transcript as a whole, however, reveals this to be a simple misstatement. Agent Fuelster later said in response to the prosecutor's specific question about that exhibit that his tests revealed that the substance in question was cocaine base, as were the other two exhibits that he tested.

Other evidence corroborated the fact that the drugs in question were crack cocaine and not some other form of cocaine base. Agent Fuelster himself noted that "the material, as I received it, was kind of wet, which is not uncommon for crack." Officer DeVilla reinforced this point, testifying that he recovered from one spot "twelve individual rock-like substances that were wrapped individually in clear plastic bags," and from another "nine smaller bags of a yellowish-white, rock-like substance .... And there was a large amount of a white, yellowish-rock material inside." An agent from the DEA's crime lab described the usual method for packaging crack and opined that the crack cocaine in this case "was packaged for distribution." Finally, Officer Aponte testified that the drugs that were recovered were "packaged for distribution" as crack cocaine. The evidence, in short, left no doubt that the substance was crack cocaine. This means both that there was no problem of insufficiency of the evidence, and that counsel was not ineffective for failing to argue more strenuously that the substance was not crack.

5. Other sentencing errors

After *Booker*, the proper calculation of the guideline range is the first step in imposing a reasonable sentence. See *United States v. Mancari*, 463 F.3d 590, 597 (7th Cir.2006). Morris makes two objections to the calculation of his guideline range on Count I. His first objection (which he failed to raise

at trial, and thus is subject to plain error review) is that his acquittal on the charge of violating § 924(c) precluded the court as a matter of law from imposing the two-level enhancement on Count I for possession of a firearm under U.S.S.G. § 2D1.1(b)(1). This argument was not good before *Booker* and it has not grown better with time. As was true pre-*Booker*, "[c]onduct underlying an acquitted charge may be included as long as that conduct is proved by a preponderance of the evidence." *United States v. Frith*, 461 F.3d 914, 917 (7th Cir.2006). Our account of the facts earlier also demonstrates that there was ample evidence to support the district court's finding that Morris at least constructively possessed the gun.

Morris's second objection is to the district court's calculation of his criminal history. He decries the fact that most of his criminal history points come from misdemeanor traffic offenses, arguing that only 5 of the 15 criminal history points come from serious felony offenses. That may be, but Morris identifies no error in the court's calculation of his criminal history. If all he means is that the ultimate sentence was unreasonable, we can review the court's decision. The judge specifically addressed the question whether the nature of Morris's prior offenses made the recommended guideline sentence unreasonable. She found that they were "serious crimes" and that "the sentence guidelines properly take account of that." Particularly in light of *Rita v. United States*, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), which allows appellate courts to apply a nonbinding presumption of reasonableness to a guidelines sentence that a district court has freely chosen, we see no reason why this sentence was flawed.

The only problem that requires correction is Morris's sentence on Count II. The court imposed a concurrent sentence of 262 months on that count, which charged Morris with possession of less than 50 kilograms of marijuana with intent to distribute. The 262–month term is above the 10–year statutory maximum for an individual with a prior conviction for a felony drug offense. See 21 U.S.C. § 841(b)(1)(D). As a result, this count must be remanded to the district court so that it can impose a new sentence that complies with the statute.

* * *

We REMAND the case to the district court for resentencing on Count II. In all other respects, we AFFIRM the judgment of the district court.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

NORTHERN District of INDIANA

UNITED STATES OF AMERICA

V.

DENARD MORRIS

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:03CR062TLS

USM Number: 05548-027

Frank Gray
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Possession with Intent to Distribute 50 Grams or More of Cocaine Base (Crack Cocaine)	8/15/2003	1
21:841(a)(1)	Possession with Intent to Distribute Marijuana	8/15/2003	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 3

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

DECEMBER 14, 2005

Date of Imposition of Judgment

S/THERESA L. SPRINGMANN

Signature of Judge

THERESA L. SPRINGMANN, JUDGE

Name and Title of Judge

DECEMBER 15, 2005

Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 2—Imprisonment

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

262 months as to Count 1; and 262 months imprisonment as to Count 2 to be served concurrently with Count 1.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____.
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3—Supervised Release

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years as to Count 1; and 5 years supervised release as to Count 2 to be served concurrently with Count 1.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and up to three periodic drug tests per year thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4. The defendant shall support the defendant's dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer at least ten (10) days prior to any change of residence or employment.

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8. The defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered, or other places specified by the court.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14. The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

15. The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C—Supervised Release

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a drug aftercare treatment program under a copayment plan which may include testing for the detection of drugs of abuse at the direction and discretion of the probation officer.

The defendant shall participate in a co-payment program to offset the cost of treatment. The co-payment amount is based on annual poverty guidelines established by the U.S. Department of Health and Human Services (HHS) on a sliding scale basis. The co-payment amount shall not exceed an amount determined by the Probation Officer's Sliding Scale For Monthly Co-Payment.

While under supervision, the defendant shall not consume alcoholic beverages or any mood altering substances, which overrides the "no excessive use of alcohol" language in Standard Condition #7.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5—Criminal Monetary Penalties

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ waived	$ n/a

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) payable to Clerk, U.S. District Court, (street address), (city, state, zip) for the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ ____	$ _____	

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6—Schedule of Payments

Judgment—Page 6 of 6

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 200.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment.

The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Name: DENARD MORRIS
Docket No.: 1:03CR062TLS

ACKNOWLEDGMENT OF SUPERVISION CONDITIONS

Upon a finding of a violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

I have reviewed the Judgment and Commitment Order in my case and the supervision conditions therein. These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U.S. Probation Officer/Designated Witness Date

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	CAUSE NO.:
	)	1:03-CR-62-TS
DENARD MORRIS	)	

SENTENCING MEMORANDUM AND ORDER

A jury convicted the Defendant, Denard Morris, of possessing with intent to distribute cocaine base crack (Count I) and marijuana (Count II), both in violation of 21 U.S.C. § 841(a)(1). The Court sentenced the Defendant to 262 months of imprisonment for each count to run concurrent. The convictions were upheld on appeal, as was the sentence on Count I. The matter was remanded for re-sentencing on Count II because the 262 months exceeded the 10-year statutory maximum. Both the government and the Defendant have set forth their positions for re-sentencing in briefs filed with the Court.

DISCUSSION

On December 14, 2005, the Court conducted a sentencing hearing for the Defendant. The Court considered the Defendant's objections to the Presentence Investigation Report and also considered his arguments for a sentence outside the advisory guideline range. The Court determined that the total offense level was 34, the criminal history category was VI, and that the range was 262

to 327 months of imprisonment. Finding that the advisory guideline range was sufficient, but not greater than necessary, to comply with the purposes of punishment set forth in 18 U.S.C. § 3553(a), the Court sentenced the Defendant to two 262 month concurrent terms of imprisonment.

After upholding the district court's calculation of the guideline range, the Seventh Circuit stated:

> The only problem that requires correction is Morris's sentence on Count II. The court imposed a concurrent sentence of 262 months on that count, which charged Morris with possession of less than 50 kilograms of marijuana with intent to distribute. The 262-month term is above the 10-year statutory maximum for an individual with a prior conviction for a felony drug offense. *See* 21 U.S.C. § 841(b)(1)(D). As a result, this count must be remanded to the district court so that it can impose a new sentence that complies with the statute.

United States v. Morris, 498 F.3d 634, 645 (7th Cir. 2007).

Under § 841(b)(1)(D), the Defendant's maximum term of imprisonment for Count II was 10 years, or 120 months. The Defendant now urges the Court to sentence him to 18 months imprisonment for Count II, a term he characterizes as being at the "low end of the Sentencing Guideline range." (DE 156 at 4) (stating that the sentencing range for the conviction on Count II is 18 to 24 months). It appears that the Defendant arrived at this range by considering only the marijuana charged in Count II and not the crack cocaine involved in Count I. However, this misinterprets the manner in which the guideline

range for controlled substances is determined. Pursuant to U.S.S.G. § 3D1.2(d), when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of the substance involved, or some other measurement of aggregate harm, the counts should be grouped together into a single group. An offense covered by § 2D1.1, which applies to violations of 21 U.S.C. § 841(a)(1), is specifically identified as an offense that should be grouped. U.S.S.G. § 3D1.2(d). Grouping Count I and II together, the advisory guideline range is 262 to 327 months imprisonment, as determined by the Court during the Defendant's sentencing hearing.

Upon arriving at this guideline range, the Court looks to Part G of the Guidelines, which is entitled "Implementing the Total Sentence of Imprisonment," to determine how a sentence within the advisory guideline range shall be imposed. Section 5G1.1 governs sentencing on a single count of conviction and U.S.S.G. § 5G1.2 governs sentencing on multiple counts of conviction. These sections work together where, as in the Defendant's case, the statutorily authorized maximum sentence for a count of conviction is less than the minimum of the applicable guideline range. *See* U.S.S.G. § 5G1.2(b) ("Except as otherwise required by law (see § 5G1.1(a), (b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter."). In that case, (where the minimum of the guideline range is greater than the statutory maximum) the "statutorily authorized maximum sentence shall be the guideline sentence."

U.S.S.G. § 5G1.1(a). Further, the Application Notes regarding sentencing on multiple counts provide:

> Usually, at least one of the counts will have a statutory maximum adequate to permit imposition of the total punishment as the sentence on that count. The sentence on each of the other counts will then be set at the lesser of the total punishment and the applicable statutory maximum, and be made to run concurrently with all or part of the longest sentence. If no count carries an adequate statutory maximum, consecutive sentences are to be imposed to the extent necessary to achieve the total punishment.

U.S.S.G. § 5G1.2, Application Note 1, ¶ 3.

This scenario is true of the Defendant's case. Count I carries a statutory maximum adequate to permit imposition of the total punishment of 262 months. The sentence on Count II should have then been imposed at the ten-year statutory maximum, (as it was the "lesser of the total punishment and the applicable statutory maximum") and been made to run concurrent with the sentence on Count I. The Court will impose a new sentence on Count II that is consistent with the sentencing guidelines and the statutory maximum, as set forth in this Sentencing Memorandum.[1]

---

[1] The Court notes that the Defendant, in addition to stating that the applicable range is 18 to 24 months, argues that the sentence should take into account the nature of the offense. In particular, the Defendant submits that the offense did not involve any serious threat of harm or violence and did not result in any harm or violence. The Court simply notes that it has already considered the § 3553(a) factors when it determined that a sentence within the guideline range was sufficient but not greater than necessary to meet the purposes

CONCLUSION AND ORDER

For the foregoing reasons, the Judgment will be modified to reflect a sentence of 120 months of imprisonment for Count II, to run concurrent to the 262 month sentence that remains imposed on Count I. The terms of supervised release remain unchanged.

SO ORDERED on November 19, 2007.

s/Theresa L. Springmann
THERESA L. SPRINGMANN
UNITED STATES DISTRICT COURT
FORT WAYNE DIVISION

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of punishment. In any event, the Defendant has not attempted to establish that his drug offense carried any less potential for harm or violence than those considered by the Sentencing Commission when determining offense levels for drug trafficking crimes.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

NORTHERN District of INDIANA

UNITED STATES OF AMERICA

V.

DENARD MORRIS

***AMENDED JUDGMENT IN A CRIMINAL CASE**

Case Number: 1:03CR062TLS

USM Number: 05548-027

Frank Gray
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) 1, 2 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

---

* Amended to reflect that 262 months as to Count 1; and 120 months imprisonment as to Count 2 to be served concurrently with Count 1.

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Possession with Intent to Distribute 50 Grams or More of Cocaine Base (Crack Cocaine)	8/15/2003	1
21:841(a)(1)	Possession with Intent to Distribute Marijuana	8/15/2003	2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 3

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

DECEMBER 14, 2005

Date of Imposition of Judgment

S/THERESA L. SPRINGMANN

Signature of Judge

THERESA L. SPRINGMANN, JUDGE

Name and Title of Judge

NOVEMBER 19, 2007

Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 2—Imprisonment

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

262 months as to Count 1; and 120 months imprisonment as to Count 2 to be served concurrently with Count 1.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:
☐ at _____ ☐ a.m. ☐ p.m. on _____.
☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
☐ before 2 p.m. on _____.
☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 2—Supervised Release

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 years as to Count 1; and 5 years supervised release as to Count 2 to be served concurrently with Count 1.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and up to three periodic drug tests per year thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.

2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.

3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4. The defendant shall support the defendant's dependents and meet other family responsibilities.

5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6. The defendant shall notify the probation officer at least ten (10) days prior to any change of residence or employment.

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substances, except as prescribed by a physician.

8. The defendant shall not frequent places where controlled substances are illegally sold, used distributed, or administered, or other places specified by the court.

9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer.

10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.

12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and

to confirm the defendant's compliance with such notification requirement.

14. The defendant shall pay the special assessment imposed or adhere to a court-ordered installment schedule for the payment of the special assessment.

15. The defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay any unpaid amount of restitution, fines, or special assessments.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3C—Supervised Release

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a drug aftercare treatment program under a copayment plan which may include testing for the detection of drugs of abuse at the direction and discretion of the probation officer.

The defendant shall participate in a co-payment program to offset the cost of treatment. The co-payment amount is based on annual poverty guidelines established by the U.S. Department of Health and Human Services (HHS) on a sliding scale basis. The co-payment amount shall not exceed an amount determined by the Probation Officer's Sliding Scale For Monthly Co-Payment.

While under supervision, the defendant shall not consume alcoholic beverages or any mood altering substances, which overrides the "no excessive use of alcohol" language in Standard Condition #7.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5—Criminal Monetary Penalties

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$ waived	$ n/a

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) payable to Clerk, U.S. District Court, (street address), (city, state, zip) for the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ ____	$ _____	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ the interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6—Schedule of Payments

Judgment—Page 6 of 6

DEFENDANT: DENARD MORRIS
CASE NUMBER: 1:03CR062TLS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A X Lump sum payment of $ 200.00 due immediately, balance due
- ☐ not later than _____, or
- ☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30

or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 25, 2007

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Diane S. Sykes, *Circuit Judge*

No. 05-4679

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DENARD MORRIS,
Defendant-Appellant.

Appeal from the United States Court for the Northern District of Indiana, Fort Wayne Division
No. 03 CR 62

Theresa L. Springmann, *Judge.*

ORDER

Petitioner-Appellant Denard Morris filed a petition for panel rehearing on September 19, 2007. In his petition, Morris has argued that this court should have reviewed his objection to the sentencing enhancement under U.S.S.G. § 2D1.1(b)(1) for clear error, rather than under the more demanding plain error standard. Although, upon further review of the record, we agree with him, the shift in standard of review ultimately makes no difference. In light of

the jury's decision to credit the witness's testimony and the other circumstantial evidence of possession, slip op. at 9-10, we find no clear error in the district court's decision to apply the enhancement.

The petition for panel rehearing is accordingly DENIED.

2004 Federal Sentencing Guidelines

U.S.S.G. § 5K1.1

Chapter 5 – PART K – DEPARTURES

1. SUBSTANTIAL ASSISTANCE TO AUTHORITIES

§ 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

(1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;

(2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;

(3) the nature and extent of the defendant's assistance;

(4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;

(5) the timeliness of the defendant's assistance.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA,
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
v.	)	CAUSE NO.:
	)	1:03-CR-62WL
	)	
DENARD MORRIS,	)	
	)	
Defendant	)	

DEFENDANT'S MOTION FOR DISCLOSURE OF EXCULPATORY EVIDENCE AND NOTICE TO THE GOVERNMENT OF SPECIFIC EXCULPATORY EVIDENCE REQUESTED

Comes now Defendant by Counsel RAY L. SZARMACH and places the Government on notice of the following requested exculpatory evidence and moves that the information requested be produced to the defense instanter.

1. Any evidence in the possession of the Government, the existence of which is known, or by the exercise of due diligence may become known to the Government, tending to show

that any individuals who may be called as Government witnesses have given conflicting or contradictory statements regarding their involvement in this case, the involvement of defendant, and/or the involvement of any alleged associated, accomplice, co-conspirator or co-defendant.

2. Any evidence in the possession of the Government, the existence of which is known or by the exercise of due diligence may become known to the Government which would tend to show that any of the alleged participants in the indictment were participants in separate conspiracies, organizations, enterprises, or activities not charged in the indictment and not involving defendant.
3. The full record of any arrests, pending cases, and criminal convictions of any witness whom the Government intends to call at trial, including any accomplices, witnesses, or unindicted co-conspirators.
4. Any evidence or records of any suspected wrongdoing or ongoing investigations in this or any other jurisdiction (state or federal) of any witness whom the Government intends to or contemplates calling at trial.
5. A full and complete statement of all promises, considerations, rewards, or inducements made by the Government, its prosecutors, agents or agencies to induce or encourage any individual's testimony, cooperation or provision of information, wherein the Government has agreed, either with the individual, their counsel agent or representative, to any of the following:

a. Not to prosecute said person for any crime or crimes;
b. Not to prosecute a third part for any crime or crimes where the reason for not prosecuting the third party is a consideration to the person;
c. To provide a formal grant of statutory immunity, or to provide an informal assurance that the person will not be prosecuted in connection with any testimony, cooperation, or information given;
d. To recommend leniency or a particular sentence for any crime or crimes for which the person stands convicted or is expected to be convicted;
e. To comply with any prior agreements although said witness may have previously violated a part of their agreement;
f. To recommend or not oppose a reduction of the offense level of the person under the United States Sentencing Guidelines for acceptance of responsibility;
g. To recommend to the sentencing authority under the United States Sentencing Guidelines a downward departure from the guidelines if that person provides substantial assistance to authorities;
h. To recommend or not oppose any downward departure or offense level reductions for the person under the United States Sentencing Guidelines;
i. To seal any plea or plea agreement of that person;

j. To provide favorable treatment or consideration, including but not limited to, money, expenses, subsistence, a job, a new location, a new start, etc. to the person or to friends or relatives of the person in return for that person's testimony, cooperation, or provision of information;

k. To make any beneficial recommendation, regarding the person to any state or federal agency;

l. To cooperate with any state law enforcement agency and that agency's agreemetn not to prosecute said person for any crime or crimes prohibited by state law; or

m. To make any other recommendation of benefit, or give any other consideration to the person or friends or relatives of said person;

n. To provide a statement to, or speak with, any law enforcement agency, prosecution official or court (state or federal) concerning the witness' assistance or cooperation.

6. Any evidence in the possession of the Government that would tend to provide or reveal a bias or motive of any witness that the Government intends or contemplates calling at trial.

7. Any evidence of past or present drug or alcoholic ingestion or dependency by any witness whom the Government intends or contemplates calling at trial. If any medical, hospital, or law enforcement records exist,

which disclose such ingestion or dependency or the treatment thereof, it is requested that the source and location of such records be provided and/or disclosed. If no such records exist, but such ingestion or dependency has been witnessed by others, it is requested that the names and addressees of such persons be disclosed.

8. Any evidence of psychiatric hospitalization, psychiatric treatment or mental disease or defect or physical disorder of any witness whom the Government intends or contemplates calling a trial. If any medical or hospital records exist, it is requested that the source and locations of such records be provided and/or disclosed. If no such records exist, but such disease, defect or disorder has been observed by others, it is requested that the names and addresses of such persons be disclosed.
9. Any evidence that may be used to impeach a witness at the trial in this case, particularly but not exclusively, inconsistent statements of a witness or between witnesses.

Respectfully submitted this 29th day of October, 2003.

s/Ray L. Szarmach
RAY L. SZARMACH, #778-45
SZARMACH & FERNANDEZ
Easton Court
260 E. 90th Dr.
Merrillville, IN 46410
219-681-6494

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	CRIMINAL
vs.	)	CAUSE NO.
	)	1:03-cr-62
DENARD MORRIS,	)	
	)	
Defendant.	)	

TRANSCRIPT OF SENTENCING PROCEEDINGS
HELD DECEMBER 14, 2005, BEFORE THE
HONORABLE THERESA L. SPRINGMANN,
UNITED STATES DISTRICT JUDGE

* * *

[THE COURT]

[24]

* * *

As to objection two, the defendant was acquitted on Count Three of the Indictment for carrying a handgun during or in relation to a drug trafficking crime. Section 2D1.1B1 requires a sentencing enhancement if, quote, "a dangerous weapon, including a firearm was possessed," end quote. The Seventh Circuit indicated in the case of the U.S. against Thomas at 294 F.3d 899 at 905, decided by

the Circuit in 2002, that quote, "it is clear that an acquittal on a firearms charge does not bar the imposition of a sentence enhancement based on the same conduct," end quote.

The jury did not find that the defendant did not carry the gun, only that the Government failed to prove beyond a reasonable doubt that he did carry the gun. In order to impose the enhancement, this Court need only find that by a preponderance of the evidence that the defendant did carry the gun.

According to the presentence report, the defendant handed Tramayne Peterson a bag containing drugs and a gun. The presentence report is based on statements made by Mr. **[25]** Peterson. Based on the evidence presented, the Court finds that the defendant possessed the gun, and that the two-level enhancement, then, is appropriate.

As to objection three, the defendant does not deserve adjustment for acceptance of responsibility, because he has done nothing to indicate any acceptance of responsibility for his crime. Merely not testifying at trial does not qualify for an acceptance of responsibility adjustment.

As to objection number four, paragraph 15, states that the gun was reported stolen on December 20th, 2002, and that the victim believes that the defendant stole the gun. Paragraph 18 states that it has not been returned.

The defendant has presented or referenced Grand Jury testimony that Ms. Brown had at that time indicated or admitted that she had not been truthful with the police in reporting the firearm was stolen. But as the Government argued, it makes no difference to the extent of showing that that firearm with that same serial number was the one, in fact,

found on Peterson in the bag, that had broken out of the bag that was handed to Peterson by Mr. Morris.

Therefore, the Court finds that the person from whom the gun was stolen is a victim of the defendant's conduct. The Court also notes that the information has no impact on the application of the advisory sentencing guidelines.

As to number 5, objection five, the Court finds that the **[26]** defendant's criminal history was calculated, as required by the sentencing guidelines.

As to objection number six, the defendant's argument is foreclosed by the clear language in the Booker decision, quote, "any fact other than a prior conviction which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt," end quote. That's citing Booker, 543 U.S. 220.

The defendant cites Justice Thomas' concurrence in the U.S. against Shepherd case at 125 S.Ct. 1254, decided in 2005, in support of his position. However, the Shepherd case doesn't help Mr. Morris. As was recognized by the 7th Circuit in the U.S. against Williams case at 410 F.3d 397 at 402, decide by the Circuit in 2005. When considering Justice Thomas' concurrence, until the Supreme Court decides otherwise, quote, "... the district court does not violate a defendant's Sixth Amendment right to a jury trial by making findings as to his criminal record that expose him to greater criminal penalties," end quote.

The Court finds that the presentence report's use of the defendant's prior convictions in calculating the advisory guideline sentence to be correct.

As to objection seven, the defendant argues that the [27] sentencing guidelines are advisory and that the departure is warranted. In this case, the Court agrees that the guidelines are advisory and the defendant will be able to have an opportunity to argue any other relevant sentencing factors that weigh in favor of a lower sentence before the Court imposes its sentence.

Based on the Court's rulings and according to the guideline recommendations, then, and without waiving any objections that have been made in the record for the defense, counsel, let me confirm that the applicable sentencing factors would now be as follows: A total offense level of 34, criminal history category Roman numeral 6, range of months of imprisonment between 262 to 367. There's no eligibility for probation. There would be five years of supervised release, a range for fine between $15,500 to five million dollars. Restitution is not an issue, and that a $200 special assessment, $100 for each count.

Counsel, based on the Court's findings, and again, without waiving the objections presented, are these calculations correct, Mr. Trgovich?

MR. TRGOVICH: Your Honor, I believe, and it may be that I misheard. I think you indicated the range of months was 262 to 367, unless I misheard and I think it's 267 to 327.

MR. GRAY: In paragraph 82, Your Honor, of the pre-sentence investigation report, that is the range that's [28] designated, page 14.

THE COURT: All right. So it would be—all right that's a typographical on our part. I apologize. That is correct. The correct range of months for imprisonment would be 262 to 327 months.

Anything else from the Government on those—on those calculations?

* * *

[THE COURT]

* * *

[36]Therefore, it would be the judgment of the Court that the defendant, Denard Morris, be committed to the custody of the Bureau of Prisons for a term of 262 months, based on Count One, and a term of 262 months based on Count Two, to be served concurrently.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of five years. This term consists of terms of five years on Count One, and a term of four years on Count Two, such terms to run concurrently.

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime, shall comply with the fifteen standard conditions that have been adopted by this Court, and shall comply with the following additional conditions: The defendant shall submit to one drug test within 15 days after being placed on supervised release, and up to three periodic tests thereafter—is it per year—per year thereafter?

PROBATION OFFICER: There's going to be a—

THE COURT: Per month thereafter?

PROBATION OFFICER: Yeah, that's fine.

THE COURT: All right. We'll show up to three [37] periodic tests per month thereafter. The defendant shall not illegally possess a controlled substance. The defendant shall not possess a firearm or destructive device.

The defendant shall participate in a drug aftercare treatment program under a co-payment plan which may include testing for the detection of drugs and abuse at the direction and discretion of the Probation Officer.

The defendant shall participate in a co-payment program to offset the cost of treatment. The co-payment amount is based on annual poverty guidelines established by the U.S. Department of Health and Human Services on a sliding scale basis. This co-payment amount shall not exceed an amount determined by the Probation Officer's sliding scale for monthly co-payment.

While under supervision, the defendant shall not consume alcoholic beverages or any mood-altering substances which override the no excessive use of alcohol language in standard condition number seven.

It is further ordered that the defendant shall pay to the United States a special assessment of $200, which shall be due immediately.

Based on a thorough review of the defendant's financial condition, as detailed in the pre-sentence report, the Court finds that the defendant does not have the ability to pay a fine. Therefore, the Court will waive the imposition of any [38] fine in the case.

The advisory guideline range exceeds 24 months, and the Court imposed—is imposing a sentence at

the low end of the range. The Court imposes the sentence on the low end of the range, because the Court finds that a sentence on the low end is sufficient to serve the purposes of punishment, and a longer sentence is not necessary to accomplish these purposes.

The Court will also make a recommendation as requested that Mr. Morris be designated to a facility within the—by the Bureau of Prisons closest to friends and family in north—that reside in Northwest Indiana.

Counsel, do either of you know of any reason why the sentence should not be imposed as stated? And let me just get a clarification on the periodic testing. Is that three within—per month?

PROBATION OFFICER: Since you added the condition for the drug treatment and the (Inaudible) tests.

THE COURT: Per year or per month?

PROBATION OFFICER: I think it could be per year.

THE COURT: With the correction it would be three periodic tests per year thereafter.

Counsel, do either of you know of any reason why the sentence should not be imposed as stated again, without waiving any objections that have been made on the record, Mr. Trgovich?

[39] MR. TRGOVICH: The Government knows of no reason, Your Honor.

THE COURT: Mr. Gray, for your client?

MR. GRAY: No, Your Honor.

THE COURT: Then the Court will order that the sentence be imposed as stated.

Now, Mr. Morris, you have heard the judgment of the Court imposing sentence upon you. Pursuant to Rule 32(j)(b) of the Federal Rules of Criminal Procedure, I now advise you that you can appeal your conviction in this case. You also have a statutory right to appeal your sentence under certain circumstances, particularly, if you think the sentence is contrary to law.

With few exceptions, any notice of appeal must be filed within ten days of judgment being entered in your case. If you want to file an appeal and you are unable to pay the costs of an appeal, you may apply for leave to appeal informa pauperis, which means you may be able to pursue an appeal at no cost to you.

If you so request, the Clerk of this Court will prepare and file a Notice of Appeal on your behalf.

* * *

2

No. 07-1094

4-25-08

In the Supreme Court of the United States

DENARD MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
ELIZABETH D. COLLERY
Attorney
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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a new trial based on a prosecutor's misleading statement that a cooperating witness was certain to receive a mandatory minimum sentence, when the statement had no reasonable likelihood of affecting the verdict.

2. Whether petitioner's Sixth Amendment rights were violated on the theory that his sentence would be unreasonable but for the sentencing court's reliance on conduct underlying a charge on which the jury had returned a verdict of not guilty.

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In the Supreme Court of the United States

No. 07-1094

DENARD MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 498 F.3d 634.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2007. A petition for rehearing was denied on September 25, 2007 (Pet. App. 55a-56a). On January 9, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including February 22, 2008, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner

was convicted of possessing 50 grams or more of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 1); and possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count 2). He was sentenced to a total of 262 months of imprisonment, to be followed by five years of supervised release. Pet. App. 21a-29a. The court of appeals affirmed in relevant part. *Id.* at 1a-20a.[1]

1. On August 15, 2003, petitioner pulled his white van up to a street corner in East Chicago, Indiana, where his cousin, Tramayne Peterson, was standing. Pet. App. 2a. Peterson got into the van, intending to ask petitioner for a ride to the mall. *Ibid.*; 01/19/05 Tr. 56-57. A few blocks later, the men drove past East Chicago police officer George Valdez, who, knowing that there was an outstanding warrant for petitioner's arrest, initiated a stop of the van. Pet. App. 2a.

As Officer Valdez approached the van, petitioner handed Peterson a gray plastic bag and said: "Take this and run." Pet. App. 2a. Peterson exited the van with the bag, and Officer Cima DeVilla, who had just arrived on the scene, gave chase. *Ibid.*; Gov't C.A. Br. 3-4. As Peterson scaled a fence, items began falling out of the bag, including baggies containing cocaine base and marijuana, a .45 caliber pistol, and an electronic scale. Pet.

---

[1] The district court initially sentenced petitioner to concurrent terms of 262 months of imprisonment, to be followed by concurrent terms of five years of supervised release. Pet. App. 1a, 21a-29a. Because the term of imprisonment initially imposed for Count 2 exceeded the statutory maximum, the court of appeals remanded for resentencing with respect to that count. *Id.* at 20a. The district court then issued an amended judgment sentencing petitioner to concurrent terms of 262 months of imprisonment on Count 1 and 120 months of imprisonment on Count 2. *Id.* at 44a.

App. 2a-3a, 17a-18a. Peterson was ultimately apprehended by a third officer, and Officer Morris arrested petitioner back at the van. Pet. App. 3a.

2. On September 4, 2003, a grand jury charged petitioner and Peterson with possessing 50 or more grams of cocaine base with intent to distribute it (Count 1); possessing marijuana with intent to distribute it (Count 2); and carrying a firearm during and in relation to a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Count 3). Indictment 1-3.

On November 3, 2004, Peterson agreed to plead guilty to the cocaine base count (Count 1), and to testify truthfully at petitioner's trial. Plea Agreement 1, 6-7. In return, the government agreed to dismiss the marijuana and firearm counts at sentencing, *id.* at 7, to seek a downward adjustment for acceptance of responsibility under Sentencing Guidelines § 3E1.1, *id.* at 2, and to recommend "a period of imprisonment at the low end of the applicable guideline range," *id.* at 5. The plea agreement stated that Peterson "underst[ands]" that the charge to which he would be pleading guilty carried a term of "imprisonment of not less than ten (10) years." *Id.* at 3. The plea agreement did not mention the possibility of a further sentencing reduction under Sentencing Guidelines § 5K1.1 or 18 U.S.C. 3553(e) (Supp. V 2005).

At petitioner's trial, Peterson testified that he had not seen the gray bag when he first got into the van, that petitioner "threw [the bag] on [his] lap" at the time of the stop, and that he did not know what was in the bag until after he started running. 1/19/05 Tr. 59, 76-80. Under questioning from the government, Peterson acknowledged that he had entered into "a plea agreement" under which the government had agreed to dismiss

Counts 2 and 3 and "make a recommendation to sentence me at the low end of the guidelines." *Id.* at 55; see *id.* at 81 (cross examination). Peterson also stated that he "underst[ood]" that he was facing a ten year "mandatory sentence." *Id.* at 55; see *id.* at 81 (cross examination).

During both its opening statement and its closing argument, the defense asserted that Peterson's testimony had been influenced by the plea agreement, noting that he was "not coming in here as a concerned citizen," but rather had "cut a deal." 1 Tr. 112-113 (Jan. 18, 2005); see 1/20/05 Tr. 23 ("What is [Peterson's] interest or bias? Got a great plea agreement, and he has a huge interest in testifying as the government expects him to testify."); see also *id.* at 35-36, 38. In its own closing arguments, the government acknowledged that "Peterson had a plea agreement," but stated that Peterson had testified that "[h]e's looking at a mandatory minimum sentence" of ten years of imprisonment, and that that sentence "has to be imposed" and was "the lowest he can get." *Id.* at 11-12; see *id.* at 17 ("It would be agreed that a ten-year sentence is something. It's not—not facing anything."); *id.* at 46 ("[A] mandatory sentence of ten years is not a great deal."). The jury found petitioner guilty on the cocaine base and marijuana counts (Counts 1 and 2) and not guilty on the firearms count (Count 3). Pet. App. 21a-22a.

After petitioner's jury returned its verdict, the government filed a motion for a downward departure on Peterson's behalf pursuant to Sentencing Guidelines § 5K1.1 and 18 U.S.C. 3553(e) (Supp. V 2005). Pet. App. 1a-2a. The district court granted the government's motion, and sentenced Peterson to 70 months of imprisonment. *Id.* at 2a.

On December 14, 2005, the district court sentenced petitioner to 262 months of imprisonment. 12/14/05 Sent. Tr. 36. Applying the preponderance of the evidence standard, the district court found that petitioner had possessed a dangerous weapon within the meaning of Sentencing Guidelines § 2D1.1(b)(1), which increased his offense level by two. 12/14/05 Sent. Tr. 24-25. Given petitioner's criminal history category of VI, his advisory Guidelines range was 262-367 months. *Id.* at 27. Had the district court not imposed a two-level increase for gun possession, petitioner's advisory Guidelines range would have been 210-262 months. Pet. 4; Sentencing Guidelines Ch.5, Pt. A (Sentencing Table).

5. a. Petitioner appealed his conviction and sentence. He argued that the government had engaged in prosecutorial misconduct by "repeated[ly] referenc-[ing] * * * a so-called 'mandatory' sentence of ten years," Pet. C.A. Br. 23, "allowing Peterson to deliver * * * false testimony" to that effect, *id.* at 26, and then "recommend[ing] * * * a sentence of only five years for Peterson," *id.* at 27. Petitioner asserted that "[t]here are two standards for determining materiality of [withheld] evidence"—standards that he associated with *United States* v. *Bagley*, 473 U.S. 667 (1985), and *United States* v. *Agurs*, 427 U.S. 97 (1976), respectively—and he argued that he prevailed "under either the *Bagley* or *Agurs* standard." Pet. C.A. Br. 26-27.

In response, the government stated that, at the time of petitioner's trial, neither it nor Peterson had anticipated that a motion for a downward departure would be filed on Peterson's behalf. Gov't C.A. Br. 24. The government explained that, under the original plea agreement, "the *only* real benefit Peterson would have received * * * would have been the avoidance of a 5 year

consecutive sentence on Count 3 (the 924(c) charge)." *Id.* at 24 n.4. Because the jury had acquitted petitioner on the firearms charge, and because "the evidence on that count was stronger on [petitioner] than it was on Peterson," the government determined that a Section 5K1.1 motion was appropriate in order to prevent the benefits that Peterson was to obtain under the plea agreement from becoming "illusory." *Ibid.* The government also noted that "[b]oth the defense and the jury were aware of Peterson's motivation to lie," and maintained that "[t]he fact that Peterson received some unanticipated and unexpected additional benefit down the road does not impact his motivation/bias at the time he testified." *Id.* at 24.

b. The court of appeals affirmed in relevant part. Pet. App. 1a-20a; see note 1, *supra*. The court concluded that it had been "improper [for the prosecutor] both to give the jury the impression that Peterson's sentence could not go below 10 years during his examination of Peterson, and then later to argue the same thing to the jury, at least when it is obvious that [at the time of petitioner's trial] the United States had not firmly rejected the possibility of the § 5K1.1 motion." Pet. App. 7a-8a.

The court of appeals further determined, however, that the prosecutor's conduct did not require reversal of petitioner's convictions. The court of appeals noted that this Court "has announced two different standards to employ in deciding whether improper comments were material," and that "[t]he easier standard for the defendant to meet" asks whether "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Pet. App. 9a (quoting *Agurs*, 427 U.S. at 103). The court of appeals described the *Agurs* standard as "not necessarily the best fit here,"

but it determined that, even under that standard, it could not conclude that the prosecutor's "improper comments were material and therefore deprived [petitioner] of a fair trial." *Ibid.* The court explained that "[t]he picture the jury had before it of Peterson's plea agreement made it aware that he was receiving a substantial benefit for his testimony and, more importantly, that he had strong incentives to please the government." *Ibid.* And although the court of appeals acknowledged that "the jury might have recognized the potential for an additional reduction in Peterson's sentence as a marginally greater incentive for Peterson to tailor his testimony in favor of the government," it determined that "the information that the jury had before it was not different enough to lead us to believe that there was a 'reasonable likelihood' that the result would have changed." *Ibid.*

The court of appeals also rejected petitioner's contention that his acquittal on the Section 924(c) count made it improper for the district court to impose a two-level sentencing enhancement for possessing a firearm. Pet. App. 18a-19a. Relying on circuit precedent decided after *United States* v. *Booker*, 543 U.S. 220 (2005), the court found that "'[c]onduct underlying an acquitted charge may be included as long as that conduct is proved by a preponderance of the evidence.'" Pet. App. 19a (quoting *United States* v. *Frith*, 461 F.3d 914, 917 (7th Cir. 2006)).[2]

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[2] The court of appeals incorrectly stated that petitioner's Sixth Amendment claim had not been raised at trial, and was therefore subject to plain error review. Pet. App. 18a-19a. The court corrected that error in its order denying rehearing, stating that "the shift in standard of review ultimately makes no difference." *Id.* at 55a.

ARGUMENT

Petitioner contends (Pet. 5-22) that this Court should grant review to consider two questions: (1) whether to recognize "a new, stricter standard of materiality" to be applied in situations where the prosecution "knowingly utilizes false testimony and disregards a specific request by the defense for exculpatory evidence known to the prosecution"; and (2) whether his Sixth Amendment rights were violated because his sentence would be found unreasonable were it not for the sentencing court's finding of a fact that constituted acquitted conduct. Pet. i. Further review is not warranted. The court of appeals' decision is correct, and petitioner does not assert that it conflicts with the decisions of any other court of appeals or state court of last resort. In addition, petitioner did not properly raise either of the questions upon which he seeks review before the court of appeals.

1. Petitioner asserts that the court of appeals "relied on a materiality standard that did not fully take into account the prejudice and injustice served upon [him]," Pet. 7, and that this Court should grant review to "consider whether a stricter standard of materiality should apply in cases that combine the knowing use of false testimony with a disregard for specific evidentiary requests," Pet. 9; see Pet. 8-18. Petitioner did not propose any "new, stricter standard of materiality" (Pet. i.) in the court below. Instead, he argued (Pet. C.A. Br. 26) that two already existing materiality standards were relevant to his claim. The first was the standard announced in *United States* v. *Bagley*, 473 U.S. 667 (1985), for cases "of prosecutorial failure to disclose evidence favorable to the accused." *Id.* at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part

and concurring in the judgment). Under that standard, evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in the judgment). The other standard petitioner identified below was the one announced in *United States* v. *Agurs*, 427 U.S. 97 (1976), which applies where "the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury." *Id.* at 103. In that situation, this Court has stated that a defendant's conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Ibid.*

In resolving petitioner's case, the court of appeals applied the "easier" and more "favorable" *Agurs* standard, despite recognizing that it was "not necessarily the best fit here." Pet. App. 9a. Because the court of appeals applied the most favorable materiality standard actually proposed by petitioner, this Court should decline to consider his current argument that a different, stricter test should govern his case. See *United States* v. *Ortiz*, 422 U.S. 891, 898 (1975) (declining to consider an issue raised for the first time on appeal by a party who advocated a contrary position in the court below). And although petitioner also suggests without explanation that the court of appeals "misapplied" the relevant materiality standard, see Pet. 8; see Pet. 15-16, that factbound claim does not warrant this Court's review.

In addition, petitioner's argument in support of a new materiality standard also rests on a dubious factual assertion that was not presented to the lower courts. In

his petition for a writ of certiorari, petitioner relies heavily on the fact that he made "a specific request * * * for exculpatory evidence known to the prosecutor." Pet. i; see Pet. 6, 8, 10, 14, 16-17. In his brief to the court of appeals, however, petitioner did not even assert that he had made such a request, much less claim that his doing so altered the relevant materiality standard. See Pet. C.A. Br. 22-24, 25-27, 28-30. As a result, the court of appeals did not consider the issue, and petitioner may not properly rely upon it as a basis for seeking to overturn the court of appeals' judgment. See *Ortiz*, 422 U.S. at 898.

At any rate, petitioner's contention that the government "disregard[ed] a specific request" (Pet. i) lacks merit. Petitioner sought disclosure of "all promises, considerations, rewards, or inducements * * * wherein the Government has agreed * * * [t]o recommend * * * a downward departure from the Guidelines if [a person] provides substantial assistance to authorities." Pet. App. 59a-60a. As the government explained in its brief to the court of appeals, see pp. 5-6, *supra*, the government never agreed to make a downward departure recommendation for Peterson, and decided to file such a motion only *after* the jury had acquitted petitioner on Count 3. Accordingly, the record does not support petitioner's claim that the government failed to disclose exculpatory material in response to a specific discovery request.[3]

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[3] It is true that "[n]o competent Assistant U.S. Attorney is unaware of the existence of U.S.S.G. § 5K1.1." Pet. 12 (quoting Pet. App. 7a). But the same is true of all competent defense attorneys. As a result, the government could not have violated its obligations under *Brady* v. *Maryland*, 373 U.S. 83 (1963), merely by failing to disclose the *existence* of that Guidelines provision to the defense. See, *e.g.*, *United*

Finally, even if petitioner's claims had been properly raised below and were supported by the record, this Court's review would still be unwarranted. Petitioner fails to explain why this Court should adopt a wholly new standard of materiality for cases that involve "multiple instances of" (Pet. 13) or "two forms of" (Pet. 9) prosecutorial misconduct. Indeed, petitioner does not even specify what standard of materiality the Court should adopt, simply asserting that due process was violated here, Pet. 16, and urging the Court to adopt *some* standard that will be "more deferential to the defense in criminal trials," Pet. 18. In any event, a new rule is unnecessary because, under existing law, courts already consider the cumulative impact of any government misconduct. See, *e.g.*, *Berger* v. *United States*, 295 U.S. 78, 89 (1935); *Solles* v. *Israel*, 868 F.2d 242, 248 (7th Cir.), cert. denied, 490 U.S. 1101 (1989).

This Court has likewise already rejected petitioner's suggestion that a "stricter standard of materiality" is called for when the prosecution "disregards a specific request for exculpatory evidence." Pet. i. In *Bagley*, this Court held that, regardless of the existence or nature of a defense request, exculpatory evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (White, J., concurring in part and concurring in judgment). Petitioner identifies no reason why that decision merits reconsideration, let alone reconsideration in a case where no lower

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States v. *Grintjes*, 237 F.3d 876, 880 (7th Cir. 2001) ("*Brady* does not apply to evidence that a defendant would have been able to discover himself through reasonable diligence.").

court has found that the government ignored a specific discovery request.

2. Petitioner contends (Pet. 18-22) that his Sixth Amendment rights were violated because his sentence would be unreasonable absent the district court's reliance on conduct underlying a charge on which the jury had returned a verdict of not guilty. That claim lacks merit and does not warrant review.

a. Relying on Justice Scalia's statement in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), that the Court's opinion "does not rule out as-applied Sixth Amendment challenges to sentences that would not have been upheld as reasonable on the facts encompassed by the jury verdict or guilty plea," *id.* at 2479 (Scalia, J., concurring in part and concurring in the judgment), petitioner contends that his Sixth Amendment rights were violated here because his sentence "would not have been reasonable without the district court finding by a preponderance of the evidence that [petitioner] possessed a firearm while trafficking drugs," Pet. 20. This Court has recently denied review in several cases that involved similar claims. See, *e.g.*, *Bradford* v. *United States*, 128 S. Ct. 1446 (Feb. 25, 2008); *Alexander* v. *United States*, 128 S. Ct. 1218 (Feb. 19, 2008), and 128 S. Ct. 1298 (Feb. 19, 2008). In addition, petitioner's claim is without merit and does not warrant this Court's review.

First, petitioner did not make an as-applied challenge to his sentence in the court below, and the court of appeals did not address such a challenge in its opinion. See Pet. C.A. Br. 32 (summarizing constitutional challenge by stating that "*Booker* and *Apprendi* Mandate that a Defendant is Entitled to Have a Jury Decide All Facts that Result in the Imposition of Sentencing Enhancements Beyond a Reasonable Doubt."); see also *id.*

at 13, 31-33. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (quotation marks and citation omitted).

Second, here, as in *Rita*, "even if some future unusually harsh sentence might violate the Sixth Amendment because it exceeds some yet-to-be-defined judicial standard of reasonableness, * * * this case does not present such a problem." 127 S. Ct. at 2473 (Stevens, J., concurring but for Part II). The concurring opinion upon which petitioner places primary reliance states that an as-applied Sixth Amendment violation would exist only if the defendant's sentence "would have been *unreasonable* in the *absence* of any judge-found facts." *Rita*, 127 S. Ct. at 2478 (Scalia, J., concurring in part and concurring in the judgment).

Petitioner cannot meet that standard. Petitioner's sentence of 262 months of imprisonment is within the advisory Guidelines range that would have applied even had the district court not found that he possessed a firearm. See p. 5, *supra*. Accordingly, it would have been entitled to a presumption of reasonableness even absent that finding. *Rita*, 127 S. Ct. at 2459.[4] Nor does petitioner identify any reason why an appellate court would set aside that presumption in his case. The jury found that petitioner possessed with an intent to distribute 50

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[4] Petitioner insists (Pet. 20-21) that, absent the firearms finding, the district court would have given him a different sentence. There is no way to know if this claim is true, but even assuming that it was, it would not support a hypothetical "as-applied" Sixth Amendment challenge. That a particular judge might have given him a lesser sentence absent a specified fact does not mean that the sentence he received was unreasonable absent that fact.

grams or more of crack cocaine, a finding that, given his prior felony drug conviction, subjected petitioner to a mandatory minimum sentence of 240 months of imprisonment. 21 U.S.C. 841(b)(1)(A) (2000 & Supp. V 2005). Petitioner's sentence is thus only 22 months above the statutory minimum sentence, and is far below the maximum available sentence of life imprisonment. See 21 U.S.C. 841(b)(1)(A)(iii). In addition, petitioner had an extensive criminal history and his offenses were committed less than two years after his release from custody for another drug offense. Presentence Investigation Report paras. 32-48, 50. See *Booker*, 543 U.S. at 244 (preserving rule that prior convictions are not subject to the Sixth Amendment principles adopted in *Apprendi* and applied to the federal Sentencing Guidelines). Given these facts, a 262 month sentence would not be unreasonable as a matter of law regardless of whether petitioner possessed a firearm. See *Gall*, 128 S. Ct. at 598 (holding that a "deferential abuse-of-discretion standard of review * * * applies to all sentencing decisions.").

b. To the extent that petitioner challenges the sentencing court's reliance on acquitted conduct, that claim also does not warrant review. In *United States* v. *Watts*, 519 U.S. 148, 157 (1997) (per curiam), this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." Although *Watts* specifically addressed a challenge to consideration of acquitted conduct based on double jeopardy principles rather than the Sixth Amendment, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account at sentencing

without offending the Constitution. See *id.* at 157. That principle predated the Sentencing Guidelines, see *id.* at 152, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005).

Since *Booker*, every court of appeals has held that a district court may consider acquitted conduct at sentencing.[5] This Court has repeatedly denied petitions for a writ of certiorari raising that issue,[6] including after its recent decisions in *Rita* and *Gall* v. *United States*, 128

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[5] See *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir. 2008); *United States* v. *Ashworth*, 247 Fed. Appx. 409 (4th Cir. 2007), cert. denied, No. 07-8076 (Mar. 31, 2008); *United States* v. *Mendez*, 498 F.3d 423, 426-427 (6th Cir. 2007); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, No. 07-605 (Mar. 31, 2008); *United States* v. *Mercado*, 474 F.3d 654, 656-658 (9th Cir. 2007), cert. denied, No. 07-581 (Mar. 31, 2008); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 127 S. Ct. 1502 (2007); *United States* v. *Dorcely*, 454 F.3d 366, 371 (D.C. Cir.), cert. denied, 127 S. Ct. 691 (2006); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005).

[6] See, *e.g.*, *Edwards* v. *United States*, cert. denied, 127 S. Ct. 1815 (2007) (No. 06-8430); *Dorcely* v. *United States*, cert. denied, 127 S. Ct. 691 (2006) (No. 06-547); *Armstrong* v. *United States*, cert. denied, 127 S. Ct. 109 (2006) (No. 05-1548); *Lynch* v. *United States*, cert. denied, 127 S. Ct. 89 (2006) (No. 05-10945); *Magluta* v. *United States*, cert. denied, 126 S. Ct. 2966 (2006) (No. 05-952).

S. Ct. 586 (2007).[7] There is no reason for a different result here.[8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2008

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[7] See, *e.g.*, *Hurn* v. *United States*, cert. denied, No. 07-605 (Mar. 31, 2008); *Mercado* v. *United States*, cert. denied, No. 07-5810 (Mar. 31, 2008); *Smith* v. *United States*, cert. denied, No. 07-7432 (Mar. 31, 2008); *Wemmering* v. *United States*, cert. denied, No. 07-7739 (Mar. 31, 2008); *Ashworth* v. *United States*, cert. denied, No. 07-8076 (Mar. 31, 2008); *Freeman* v. *United States*, cert. denied, No. 07-9368 (Mar. 31, 2008).

[8] After the Sixth Circuit upheld a district court's consideration of acquitted conduct in *United States* v. *Mendez*, 498 F.3d 423, 426-427 (2007), a panel of that court issued an opinion adhering to the *Mendez* ruling but suggesting that the defendant file a petition for rehearing en banc on the question of whether the continuing use of acquitted conduct as a sentencing enhancement violates *Booker*. *United States* v. *White*, 503 F.3d 487, 487 (2007). On November 30, 2007, the Sixth Circuit withdrew the panel opinion in *White* and granted rehearing en banc. See 503 F.3d at 487. Because the panel decision in *Mendez* remains in effect, however, there is no current conflict in lower court authority, this Court's review would be premature at this time.

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No. 07-1094

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In the Supreme Court of the United States

DENARD MORRIS,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

In its Brief in Opposition the government asserted several arguments against granting the petition, yet it failed to debunk the meritorious questions and arguments raised by petitioner. The government cited little relevant precedent and ignored precedent that supports petitioner's actions. Petitioner has presented important questions to this Court and has survived the government's attempts to discredit his arguments.

Petitioner brought a claim in the Court of Appeals for the Seventh Circuit that the prosecution violated his due process rights by knowingly using false testimony and deliberately misleading the jury, as well as failing to disclose exculpatory evidence. *See* Pet. App. 7a. In holding that the prosecutorial misconduct in *Morris* did not violate petitioner's rights, the Seventh Circuit not only failed to prohibit such flagrant conduct in *Morris*—the court has also blazed a trail that will empower future prosecutors to abuse the due process rights of criminal defendants. Deliberate prosecutorial misconduct, through the knowing use of false testimony combined with a failure to disclose exculpatory evidence to the defense, requires a stricter standard of materiality than the standard applied by the Seventh Circuit.

1. The government beleaguers the point in its Brief in Opposition that petitioner is barred from bringing his claim of prosecutorial misconduct as he did not raise the particular arguments in the court below. *See* Opp. 8. However, the fact remains that petitioner properly raised a prosecutorial misconduct claim in the Seventh Circuit. In his Seventh Circuit

appeal, petitioner claimed that the prosecution violated his due process rights by failing to disclose a sentence reduction and misleading the jury as to the minimum sentence for its sole eyewitness. *See* Pet. App. 7a. Petitioner does not seek to bring a new *claim* in his petition, but rather provides additional arguments in support of his original claim that the prosecutorial misconduct present in his trial violated his rights under the Constitution. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *see also Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Here, petitioner merely provides an additional argument to support his contention that the prosecution's misconduct violated his right to a fair trial. In particular, petitioner argues that the misconduct that occurred in his case—the knowing use of false testimony, combined with the prosecution's failure to disclose a sentence reduction where the defense had provided a specific *Brady* request—requires a stricter standard of materiality to protect due process rights.

Petitioner's claim in the Seventh Circuit was, and remains, that the prosecutorial misconduct at issue violated petitioner's due process rights. Petitioner only seeks to present a new argument in support of this claim and to present a meaningful question to this Court.[1] "A litigant seeking review in this Court

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[1] Petitioner presents the additional *argument* that the misconduct involved the failure to provide exculpatory materials requested under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Exculpatory materials were specifically requested at trial, *see* Pet. App. 58a–62a, and the Seventh Circuit held that

of a claim properly raised in the lower courts . . . possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below." *Yee*, 503 U.S. at 535. In his appeal, petitioner followed established Seventh Circuit case law on materiality in arguing that the prosecutorial misconduct violated his due process rights. The government essentially argues that following Seventh Circuit precedent in crafting an argument to that court precludes petitioner from asking this Court to apply a new standard of materiality in cases such as this one involving blatant prosecutorial misconduct. *See* Opp. at 9. The government fails to point to any precedent requiring petitioner to present a novel argument in the court below in order for this Court to grant certiorari. Although a new argument is brought in this Court, the underlying claims brought in the court below remain intact.

The complex set of facts in *Morris*—involving the knowing use of false testimony, combined with a failure to disclose exculpatory materials that had been requested by the defense—does not fit squarely into the Court's prior holdings. In its opinion, the Seventh Circuit applied a "reasonable likelihood of affecting the jury" standard due to the prosecution's knowing use of false testimony. Pet. App. 9a. However, instead of solely involving the deliberate use of false testimony, petitioner's case further involved a failure by the prosecution to provide exculpatory impeachment evidence to the defense.

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the prosecution deprived petitioner of impeachment evidence by failing to disclose to petitioner a potential downward departure under U.S.S.G. § 5K1.1. *See* Pet. App. 7a–8a.

See Pet. App. 8a. Petitioner's case thus bridges the gap between two different lines of cases. One line, derived from this Court's decision in *Mooney*, holds that "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153 (1972) (quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (per curiam)). The other line stems from *Brady*, in which this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In the wake of the Seventh Circuit's decision in *Morris* it is evident that the materiality standard applied by the court was insufficient to protect due process rights where the misconduct not only involves the knowing use of false testimony, but also the failure to provide impeachment evidence requested by the defense.

The government asserts that no facts support the argument that the government disregarded a specific *Brady* request for exculpatory material. Opp. 10. The government attempts to apply the same argument that fell on deaf ears in the Seventh Circuit by stating that the prosecution never explicitly agreed to a downward departure under U.S.S.G. § 5K1.1 prior to trial and thus was not required to disclose it to the defense. *See* Opp. 10. That argument was rejected by the Seventh Circuit when it held that the failure to disclose the possibility of a downward departure to the defense, and the corresponding use of known false testimony to mislead the jury, amounted to prosecutorial

misconduct. *See* Pet. App. 8a–9a. Even if, as the government argues, a competent defense attorney should be aware of U.S.S.G. § 5K1.1, Opp. 10–11 n.3, the Seventh Circuit's holding of prosecutorial misconduct for failure to disclose impeachment evidence implies that such knowledge did not excuse the government from its obligation to inform the defense that it might seek a downward departure.

2. The government misses the mark in arguing that a new standard of materiality is unnecessary due to the fact that courts already address the cumulative impact of government misconduct. Opp. 11 (*citing Berger v. United States*, 295 U.S. 78, 89 (1935); *Solles v. Israel*, 868 F.2d 242, 248 (7th Cir.), *cert. denied*, 490 U.S. 1101 (1989)). On the contrary, a new stricter materiality standard is necessary to prevent the egregious prosecutorial misconduct found in this case and in order to prevent similar misconduct in the future. The Seventh Circuit decision in *Morris* shows that the "reasonable likelihood of affecting the jury" standard, applied where the prosecution knowingly uses false testimony, is insufficient where the knowing use of false testimony is in conjunction with a failure to provide requested *Brady* materials, in violation of both the *Mooney* and *Brady*. The Seventh Circuit's decision in *Morris* amounts to a tacit acceptance of the prosecution's deliberate misconduct. If the Seventh Circuit's application of materiality and its conclusion are allowed to stand, the decision would not only violate petitioner's due process rights, it would also give future prosecutors free reign to deliberately engage in similar misconduct with no repercussions. Such a result should not be allowed by this Court, as this conduct strikes at the heart of

the integrity of the trial. *See Giglio*, 405 U.S. at 153.

3. The government also argues that petitioner's case is not certworthy, as he has not articulated a precise terminology for such a stricter materiality standard. The government, however, fails to cite even one case holding that petitioner is required to explicitly define such a standard. Opp. 11. Petitioner argues that due process requires a stricter standard of materiality for a case that bridges the gap between *Mooney* and *Brady*, involving the prosecution's knowing use of false testimony with its failure to provide exculpatory aterials specifically requested by the defense. Although the "reasonable likelihood of affecting the jury" standard may work effectively for cases solely involving the use of false testimony to mislead the jury, such a standard is insufficient where the misconduct is compounded by a failure to disclose exculpatory materials to the defense. Instead, a stricter standard is needed to prevent prosecutors from engaging in such deliberate misconduct as occurred in *Morris*. Petitioner asks the Court to use its discretion to determine a materiality standard appropriately deferential to due process considerations, as the Seventh Circuit's standard failed to adequately consider the compounded misconduct in his case.

4. The government mistakenly argues that petitioner never made an "as-applied" challenge to his sentence in the lower courts, and therefore his claim is without merit. Opp. 12. The government's reliance on *United States v. Williams*, 504 U.S. 36 (1992), does not support its contention that a sentencing challenge was not made in the court below. Petitioner clearly argued to the Seventh Circuit that the sentencing enhancement based on

acquitted conduct violated his Sixth Amendment rights, Pet. C.A. Br. 31–32; Pet. App. 18a–19a, and that his sentence was unreasonable. Pet. C.A. Br. 34; *see also* Pet. App. 19a. As discussed above, petitioner is free to make additional arguments in support of a claim that has been properly presented in the courts below. *See Yee*, 503 U.S. at 534. In addition, petitioner can present his questions to this Court in any way he chooses and is not limited solely to the questions presented below. *Id.* at 535. Petitioner's underlying claims—that his sentencing enhancements violate the Sixth Amendment and that his sentence was unreasonable—have not changed. Petitioner merely seeks to present additional arguments in support of his claims, as is allowed under this Court's decision in *Yee*.

Justice Scalia recognized in his concurrence in *Rita v. United States* that a Sixth Amendment challenge is available against a sentence that would not have been upheld as reasonable without the existence of judge-found facts. 127 S. Ct. 2456, 2479 (Scalia, J., concurring). Petitioner presents his question based on the ambiguity in this Court's jurisprudence as articulated by Justice Scalia in *Rita* and thereby argues that his sentence violates the Sixth Amendment, as it would not have been reasonable but for an enhancement due to acquitted conduct.

5. The government argues in its Brief in Opposition that petitioner cannot meet the standard he proposes, and thus his claim lacks merit. Opp. 13. The government fails to see the forest through the trees. Reasonableness is not determined in a vacuum; it instead should be evaluated on a case by case basis. As was argued in *Rita*, an appellate

court must evaluate "what motivated the [district court's] individualized sentencing decision." 127 S. Ct. at 2472 (Stevens, J., concurring). Further, in determining a sentence, a district court's particular insights are invaluable. *See Koon v. United States*, 518 U.S. 81, 98–99 (1996).

Despite the presumption of reasonableness for Guidelines range sentences applied in *Rita*, such a presumption is rebuttable, and in petitioner's case the sentence would be unreasonable but for the existence of a sentencing enhancement for gun possession, a charge for which petitioner was acquitted by the jury. The district court sentenced petitioner to 262 months after enhancing his sentence due to its conclusion that he possessed a gun. Pet. App. 3a. As the government noted, no determination can be made for the precise sentence that the district court would have given in the absence of the enhancement for gun possession. Opp. 13 n.4. However, it would defy logic to conclude that a judge would give an identical 262 month sentence both with and without a firearm enhancement. *See* Pet. 21. The only logical conclusion is that without the firearm enhancement, the sentence imposed by the district court in this case would undoubtedly have been lower than 262 months. *See id.* Therefore, the 262 month sentence in *Morris* would be unreasonable in the absence of the sentencing enhancement, and this case provides the Court with an opportunity to clarify an ambiguity in federal sentencing law by addressing petitioner's question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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